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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

JURISDICTIONAL STATEMENT

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Attorney General,
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

The appellants, State of Washington, its governor and attorney general, Yakima County, and its three county commissioners appeal to this court from the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 29, 1977. (petition for rehearing denied July

1, 1977). The opinion, which is set forth in Appendix A, has not yet been published in the Federal Reporter.

OPINIONS BELOW

This action was commenced as a declaratory judgment action in the United States District Court for the Eastern Dstrict of Washington in May, 1971, by the Confederated Bands and Tribes of the Yakima Indian Nation. Defendants were the State of Washington and its governor and attorney general, Yakima County, and the three members of the board of county commissioners. The jurisdiction of the court was invoked pursuant to 28 U.S.C. §§ 1343 and 1362. The action sought a declaration on behalf of the tribe that the State of Washington's assumption and exercise of jurisdiction over its reservation and members was invalid on both constitutional and statutory grounds. The plaintiff claimed that chapter 37.12 RCW, the act under which the State of Washington has assumed and exercised jurisdiction over Indian reservations located within its borders, violated the Fourteenth Amendment to the United States Constitution, Article XXVI of the Washington State Constitution, the Washington State Enabling Act (25 Stat. 676), and Public Law 83-280 (67 Stat. 588, 22 U.S.C. 1162, 18 U.S.C. 1360). The tribe also sought, in the alternative, a declaration that the jurisdiction assumed and exercised by the state was non-exclusive and concurrent with federal and tribal jurisdiction.

After extensive discovery and the entry of a lengthy and detailed agreed pre-trial order, the trial court granted defendants' motions for partial summary judgment on seven issues of law. In granting that motion, the trial court held that it was unnecessary for the State of Washington to amend Article XXVI of its constitution prior to assuming jurisdiction over Indian reservations; that the State of Washington could assume less than full jurisdicition under the provisions of Public Law 83-280; that state jurisdiction was exclusive rather than concurrent; that the plaintiff tribe's consent to the assumption of state jurisdiction was unnecessary; that the tribe lacked standing to raise the question of the vagueness of RCW 37.12.010; that regardless of the issue of standing, RCW 37.12.010 met the constitutional standards for definiteness; and that the provisions of Chapter 37.12 RCW met the constitutional standards of due process and equal protection. (The trial court's opinion on partial summary judgment is not necessary to review the judgment appealed from and is, therefore, not included in the Appendix.)

The question of the constitutional validity of state jurisdiction over the Yakimas' reservation as applied was reserved for a factual determination. After a one-week trial, the court held that the state's assumption and exercise of jurisdiction over the plaintiff and its members involved no violations of either the due process or equal protection clauses of the Fourteenth Amendment and dismissed the complaint. (Opinion, Appendix D)

On appeal, a panel of the United States Court of Appeals for the Ninth Circuit heard argument in the spring of 1975. Subsequently, on March 26, 1976, the panel assignment was withdrawn and the court, *sua sponte*, ordered the case to be heard en banc, with consideration by the en banc court limited to the question of whether to overrule the opinion of the court in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (Ninth Circuit, 1966), in part, beginning at 368 F.2d 655 (*Quinault II*), in which the court held that Congress, in enacting Public Law 83-280, had authorized Washington's partial assumption of jurisdiction over Indian reservations. After argument, the majority of the en banc court adhered to the opinion in *Quinault II* and held that Washington's assumption of less than full jurisdiction was authorized by PL 83-280. The court then remanded the case to the panel before which it was initially heard to consider the constitutional issues involved. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443 (Ninth Circuit, 1977) (Opinion, Appendix C).

On remand the panel unanimously held that Washington's so-called "checkerboarding", that is the jurisdictional distinction between trust and non-trust lands within the exterior boundaries of Indian reservations, fails to meet any formulation of the rational basis test and thus the statute, as enacted, violated the Equal Protection Clause of the Fourteenth Amendment. The court also held that under Washington law the statute was non-severable and

struck down all of RCW 37.12.010. (Opinion On Remand From The Court En Banc, Appendix A)

On July 1, 1977, the court denied a petition for rehearing, (Appendix B) and on July 21, 1977, upon motion of the defendants, entered an order staying the issuance of the mandate pending this court's disposition of the appeal.

JURISDICTION

This is an appeal pursuant to 28 U.S.C § 1254(2) from a judgment of the Court of Appeals holding a state statute, RCW 37.12.010, invalid as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The complaint in this action sought to have Chapter 37.12 RCW declared unconstitutional and void as violative of both Public Law 83-280 and the United States Constitution. Alternatively, the complaint sought a declaration that Chapter 37.12 RCW, as applied to the plaintiff, failed to provide equal protection and sought a mandatory injunction requiring the defendants "to provide equal protection to the members of the Yakima Indian Nation." As a further alternative, the complaint sought a declaration that the jurisdiction assumed and exercised by the State of Washington pursuant to Chapter 37.12 RCW was concurrent with federal and tribal jurisdiction. As a final alternative, the complaint sought a declaration that the state's assumption of jurisdiction over eight specific areas enumerated in RCW 37.12.010 (see Appendix E) on trust lands within the ex-

terior boundaries of the Yakima Indian reservation was void. The Court of Appeals' judgment invalidating RCW 37.12.010 was entered on April 29, 1977. The Court of Appeals' order denying the petition for rehearing was entered on July 1, 1977. A Notice of Appeal to this court was filed with the clerk of the Court of Appeals for the Ninth Circuit on July 27, 1977, (Appendix F). Because the Court of Appeals invalidated RCW 37.12.010 on United States constitutional grounds, this court has jurisdiction on appeal pursuant to 28 U.S.C. § 1254(2). See, *e.g.*, *Watson v. Employers' Liability Assur. Corp.*, 348 U.S. 66 (1954); *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Dutton v. Evans*, 400 U.S. 74 (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions to be reviewed on this appeal are the Equal Protection Clause, § 1 of Amendment XIV to the United States Constitution and RCW 37.12.010 (§ 1, Chapter 36, Laws of 1963, amending Chapter 240, Laws of 1957). Chapter 37.12 RCW is set forth in full in Appendix E.

QUESTIONS PRESENTED

In 1953, by the enactment of Public Law 83-280, the Congress of the United States permitted states to assume jurisdiction over Indians and Indian reservations, with certain exceptions, located within their borders. Responding to Public Law 83-280, the State

of Washington in 1957 obligated itself to assume civil and criminal jurisdiction over Indians and Indian reservations within the state at such time as a tribe or its governing body adopted a resolution petitioning the state to assume such jurisdiction. (Chapter 240 Laws of 1957)[1]. In 1963, recognizing that certain areas of fundamental and overriding concern to the state were not being adequately addressed within many of the Indian reservations in the State of Washington, the state legislature amended Chapter 240, Laws of 1957 by the enactment of Chapter 36, Laws of 1963, codified as Chapter 37.12 RCW. The 1963 enactment obligated the state to assume all jurisdiction within Indian reservations except for tribal members while on tribal or trust lands. The 1963 act further provided that throughout reservations the state would exercise jurisdiction as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12.010, Appendix E)

The opportunity for Indian tribes to seek and obtain the full assumption of state jurisdiction by petition was retained. The Court of Appeals struck down this statutory scheme on equal protection

[1]Of 23 such reservations within Washington, 11 originally petitioned for, and the state assumed, full jurisdiction. The Governor subsequently rescinded the proclamation as to the Quinault Reservation in recognition of an earlier mistake, and retroceded all but the jurisdiction exercised pursuant to RCW 37.12.010 as to the Port Madison Reservation. The validity of that action is one of the issues in a case currently pending before this court. See *Oliphant v. The Suquamish Tribe, et al.*, No. 76-5729, October Term, 1976.

grounds, finding that the act failed to meet "any formulation of the rational basis test."

This appeal presents the following question: (1) Whether any rational basis exists for the State of Washington to have assumed jurisdiction within Indian reservations in a manner which recognizes both the fundamental interests of the state *and* the unique historical and cultural status of trust lands?

STATEMENT OF THE CASE

A. The Statutory Scheme

Public Law 83-280, enacted by the United States Congress in 1953, provided for the immediate assumption of jurisdiction over Indians and Indian reservations, with certain exceptions, by the States of California, Minnesota, Nebraska, Oregon and Wisconsin. That same act, in §§ 6 and 7, allowed other states to assume such jurisdiction, provided certain conditions were first met.

Responding to Public Law 83-280, the State of Washington in 1957 obligated itself to assume civil and criminal jurisdiction over all Indians and Indian reservations located within the state only when a tribe or its governing body adopted a resolution petitioning the state to assume such jurisdiction. (Chapter 240, Laws of 1957) In 1963 the state legislature amended Chapter 240 by enacting Chapter 36, Laws of 1963, now codified as Chapter 37.12 RCW. That amendment provided for the assumption of all jurisdiction over Indians and Indian lands located within an Indian reservation which were not

tribal or allotted lands and not held in trust or subject to a restriction against alienation, and for jurisdiction over all Indians when on such tribal or trust lands only as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12.010)

The tribes were left free to seek and obtain a complete assumption of state jurisdiction by petition. (RCW 37.12.021)

The Confederated Bands and Tribes of the Yakima Indian Nation has not adopted a resolution petitioning the governor to proclaim total state civil and criminal jurisdiction over its reservation and members.

Six times since the original assumption of jurisdiction by the State in 1957 various Indians or Indian tribes have challenged that act on numerous grounds. Until the opinion of April 29, 1977, no such challenge succeeded.

B. Applicable Facts

The plaintiff appellee is an Indian tribe or nation established by treaty with the United States (Treaty with the Yakimas, 12 Stat. 951). At the time of trial the tribe had a membership approaching 6,000, approximately half of whom resided within the exterior boundaries of the Yakima Indian reservation. That reservation is located within the exterior boundaries

of the State of Washington and principally within the exterior boundaries of Yakima County. The Yakima Indian reservation has approximately 1,387,505 acres, of which all but approximately 270,895 acres are held in trust or restricted status by the United States. (Pre-Trial Order, Record, p. 486) The Yakima Indian reservation at the time of trial had a resident population of approximately 25,000, of which only approximately 3,000 were members of the Yakima Indian Nation. (Pre-Trial Order, Record, p. 486)

Several large, essentially non-Indian communities, are located within the exterior boundaries of the Yakima Indian reservation. The principal such communities are the Cities of Wapato and Toppenish. The land located within those cities, as well as other non-Indian communities located within the reservation, is almost entirely owned in fee and occupied by non-Indians. (Exhibits 33, 34, 52, 55, and 109)

The parties stipulated, on March 20, 1973, prior to trial, that insofar as the nature and quality of law enforcement services were concerned all of the residents of Yakima County, including the members of the Yakima Indian Nation residing within their reservation, fair no worse than the residents of many of the counties of the State of Washington, and better than many. (Stip., Record pp. 722-729) The record is replete with substantial evidence that the members of the Yakima Indian nation, whether residing within or without the borders of their reservation, are not discriminated against and receive substantially the

same law enforcement and other services from the state and county as do all other citizens of the state and residents of the county. References to some few examples of such evidence will suffice for purposes of this jurisdictional statement.

Officer Del Young, at the time of trial a Yakima County deputy sheriff with 23 years experience patrolling the Yakima Indian Reservation, testified in substance that no discrimination exists in the application of law enforcement services on the reservation. For example, Officer Young testified that the so-called "checkerboard" system of jurisdiction under RCW 37.12.010 is no hindrance to effective law enforcement on the reservation, at least for someone with some experience in that area. (Transcript pp. 220-221) Officer Young further testified that the relationship between the Yakima County sheriff's office and the Yakima Indian Tribal Police Force is good and has been good over the years. (Transcript p. 226) With regard to the question of whether or not preferential treatment would be given to a non-Indian victim of a crime within the Yakima Indian Reservation over an Indian victim of a crime, Officer Young testified as follows:

> "Q. If you are in a position where a crime is reported to you, and you have the duty to respond in some way, and you would receive two such calls at the same time, approximately, and you haven't gone to either one of them yet, you have just received them, and one originates with a non-Indian victim, and one with an Indian victim, and the crimes are about equal in severity,

would you favor one or the other on the basis of racial identity of the victim?

A. No, I would not." (Transcript p. 228)

Officer Burdett Kent is a Yakima County deputy sheriff, and an enrolled member of the Yakima Indian Nation. (Transcript p. 231) Officer Kent resides on, and is responsible to patrol the Yakima Indian Reservation during the evening hours. (Transcript p. 233) Officer Kent also testified that the so-called "checkerboard" system of jurisdiction provides no difficulty in enforcing the law. He said, for example:

"Well, when we answer a call, we go to the scene. At our level there doesn't seem to be any difficulty." (Transcript p. 233)

Yakima County Sheriff John H. Thompson testified that while it was true that more men were assigned to the Upper Valley (basically, the urban area around the City of Yakima) rather than in the Lower Valley (including the Yakima Indian Reservation) this was because of the higher density of population, and the requirement for more law enforcement officers to handle the higher workload. (Transcript p. 515) While it is true that slightly less than one-third of the uniformed officers of the Yakima County sheriff's office are assigned to patrol in the Lower Valley, including the Yakima Indian Reservation, that one-third equals no less than one-half of the work experience of the entire uniform division of the sheriff's office. (Ex. 216)

Cross-deputization exists between the Yakima

County sheriff's office and the Yakima Indian Tribal Police. (Transcript pp. 222, 519, 520)

Over half of the land of the Yakima Indian Reservation is closed to non-tribal members. Virtually all of the land in that area is in trust status. (Ex. 34) During the summer months at least one-half of the members of the Yakima Indian Nation reside within the closed area. (Transcript p. 443) Even though the Yakima Indian Nation is now complaining about an alleged inability on the part of the state to provide law enforcement services on trust lands because of the jurisdictional system established by RCW 37.12.010, a non-Indian deputy sheriff in order to make an arrest or answer a complaint in an area encompassing more than half of the Yakima Indian Reservation would have to seek permission of the tribe before entering the closed area. (Transcript p. 444)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Issue Is Of Critical and Nationwide Importance.

The question presented to this court by this appeal is of critical importance to the state and to thousands of non-Indian citizens living on reservations as well as to the Yakima Indian Tribe, and other tribes occupying reservations within the State of Washington.

Twenty-three Indian reservations exist within the exterior boundaries of the State of Washington. Of these, fourteen are subject to the jurisdiction

established pursuant to RCW 37.12.010. (See note 1, p. 7) Those tribes and their members will be directly affected by the judgment of the Court of Appeals if it is allowed to stand.

In other litigation certain non-party tribes occupying other reservations which are subject to the full jurisdiction of the State of Washington are taking the position that the distinction between "full" and "partial" jurisdiction reservations within the state constitutes statewide "checkerboarding" and thus violates the Equal Protection Clause based on the rationale of the Ninth Circuit in this case.

We cannot state more eloquently the seriousness of the problem involved than did the author of the majority en banc opinion on the question as to whether Congress authorized, in enacting PL 83-280, the assumption of less than total jurisdiction over Indian reservations:

> "To hold, as the dissent would have us do, that any *partial* assumption of *criminal* jurisdiction by the states is violative of PL-280 would overturn the jurisdictional systems under which live approximately 16,000 Indians in the State of Washington and 5,000 Indians in Idaho. The jurisdictional systems under which 115,000 Indians in Arizona and 22,000 Indians in Montana live would also be jeopardized. The effects of such an immediate jurisdictional upheaval would be far-reaching and quite unpredictable for the approximately 158,000 Indians potentially affected by this decision.
>
> "For example, Washington has performed certain services since 1963. Doubts about whether tribal or federal authorities would be ready to step in immediately are quite reasonable. Consider highway traffic law enforcement and juvenile delinquency, two specific areas where state jurisdiction would be invalidated under the view of the dissenters. Both are complicated fields. Patrol cars and officers are necessary if the highways are to be efficiently patrolled. Skilled personnel, as well as specialized detention facilities, are needed to handle the problems presented by the delinquency of juveniles. It is very doubtful that the tribe or the federal government immediately could provide these resources. Even if the states are providing only minimal services, it is unlikely that tribal or federal authorities could equal or surpass that level in the near future.
>
> "Other 'option states' within the circuit would confront similar uncertainties and confusion. 'Option states' not within the circuit, moreover, could not view such action with indifference. Until the dissent's position was acted upon by their circuit, and possibly ruled upon by the Supreme Court, any partial assumption of jurisdiction, not arranged pursuant to procedures of the 1968 legislation, would be under a cloud." 550 F.2d 443, p. 445 (Appendix C, pp. 40, 41)

Even a cursory analysis of the panel opinion, constituting the judgment here appealed from, discloses the potentially devastating nationwide consequences involved if that opinion is allowed to stand. The opinion states:

> "We hold that Washington's partial assumption of jurisdiction based upon *this land title classification* cannot withstand the Yakimas' equal protection attack and we strike down Sec. 37.12-.010." (Footnote omitted) (Emphasis supplied) (Appendix A, p. 33);
>
> "Third, we need not here decide whether the Supreme Court continues to espouse the tradi-

tional two tier equal protection approach, because Washington's *title based* classification fails to meet any formulation of the rational basis test.". (Footnote and citations omitted) Emphasis supplied) (Appendix A, p. 34);

"The operative criterion of the criminal jurisdiction classification at issue is the *status of title*.". (Emphasis supplied) (Appendix A, p. 34)

Under the reasoning of the panel opinion, *any* jurisdictional system based on land status, or, as the panel indicates, a "title based classification" would be similarly invalid. Presumably, then, any "checkerboarding approved by the Congress of the United States, or the legislature of any State, would be equally invalid.

Within the State of Washington are located several federal enclaves, at the borders of which the jurisdictional systems of the state and federal governments meet. Under the panel's reasoning persons residing on or visiting the Fort Lewis military reservation, McChord Air Force Base, the Puget Sound Naval Shipyard, Fairchild Air Force Base, and the Mount Rainier, Olympic and North Cascades National Parks are deprived of the equal protection of the law to the same extent as are the members of the Yakima Indian Nation residing or located upon trust lands within their reservation.

Is it a denial of equal protection, for example, for a civilian who is charged with an offense within Fort Lewis to be subject to the jurisdiction of the United States courts pursuant to 28 U.S.C. rather than the laws of the State of Washington? That

jurisdictional distinction is founded upon a "title based classification".

Is a person who exceeds the applicable speed limit within Mount Rainier National Park denied equal protection by being required to appear before a United States Magistrate rather than a judge of a district court of the State of Washington? That result too is based upon a "title based classification." Such a radical application of the equal protection doctrine is obviously of nationwide significance.

B. **A Rational Basis Exists For The Legislative Scheme Invalidated.**

The panel opinion and the judgment appealed from evidences a misunderstanding of the jurisdictional system adopted by the state and the reasons for adopting that system. Further, the opinion strikes down the system on grounds that are equally applicable to the presently existing system within almost all federal enclaves, including, but not limited to, "Indian country." It also invalidates the very type of system which, according to the Court of Appeals' *en banc* opinion, was contemplated by the Congress in enacting Public Law 83-280 in 1953.

The Ninth Circuit's Panel noted only one of the arguments advanced by the state in support of its jurisdictional system: That the eight enumerated categories over which the system assumes jurisdiction over Indians and Indian lands regardless of the consent of the tribe were those categories in which the state has the most fundamental concern for the welfare of its people.

The panel incorrectly stated, however, that "* * * it [the state] did not argue that any other purpose was intended to be served by this limited jurisdiction over criminal acts committed on reservations and no other rationale leaps to our eyes." (Appendix A, p. 35). We presented in our brief a number of other arguments, including a recognition of the special status of Indians and of the "unique, cultural and historical factors at play in attempting to apply white law to Indians". We also cited the special relationship between the federal government and Indian tribes and the exclusion of Indians who are enrolled members of a tribe on their own lands from the application of certain state laws as a logical state extension of the federally recognized special status of Indians for some purposes. (Brief of appellees, p. 57)

Assume a reservation on which there is no "checkerboarding" at all, i.e., all of the land is Indian ("non-fee") land. No one could then seriously argue that the Indians were denied equal protection if state jurisdiction stopped at the reservation boundary. It is surely constitutional to apply state law to Indians who are outside of the reservation, but not to apply it to Indians inside the exterior boundaries of the reservation. Indeed, that was exactly the situation prior to RCW 37.12.010 and is the situation in many states today. (Compare, *Mescalero Apache Tribe v. Jones*, 411 U.S. (1973) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

No such reservation now exists in the State of Washington. All reservations in the State have

"checkerboarding" of land ownership. What the state legislature did, in effect, when confronted with this pattern of land tenure within Indian reservations, was simple. It said that over crimes committed on non-Indian ("fee") lands within the exterior boundaries of reservations, state jurisdiction would apply to Indians and non-Indians alike, just as if that land were located outside the reservation boundaries.

The cities of Wapato and Toppenish, for example, are both located within the exterior boundaries of the Yakima Indian Reservation, but are on land almost entirely owned by non-Indians. The state legislature decided, in effect, that those cities and their residents were to be treated just as if they were located outside the exterior boundaries of the Yakima reservation. If a Yakima Indian shops on non-Indian land in downtown Wapato, the legislature saw no reason that state jurisdiction should not apply to him just as if he were in downtown Yakima or Seattle.

In other words, the legislature recognized the reality of the so-called "checkerboarding" and treated the Indian lands remaining within the exterior boundaries as the *real* or diminished reservation.[2]

In connection with Indian lands, on the other hand, the legislature offered the tribes a choice! "With respect to your own lands, you can either have state jurisdiction apply, just as on non-Indian lands, and just as on lands outside the reservation; alternatively, you can continue to have those non-fee lands

[2]Cf. Rosebud Sioux Tribe v. Kniep, ... U.S. ..... (April 4, 1977) 45 L.W. 4346.

subject to federal law, with the exceptions which are vital to the state." The legislature thus recognized the strong historical and cultural link between the concept of tribal self-government and Indian land ownership. Whether that link was to be maintained or severed on trust or tribal lands was left entirely to each tribe.

But the choice which the state gave to the Yakima Tribe was, by reason of the eight enumerated categories, not a complete one. The state made the decision that there were certain areas of subject matter jurisdiction which were so fundamental and important that they would not be left to tribal self-government.

In reaching these decisions, the legislature necessarily considered the rights and desires of both Indians and non-Indians in an integrated society. Non-Indians, who reside and own land within the exterior boundaries of Indian reservations, and who substantially outnumber the reservation Indian population not only upon the Yakima reservation but upon most other reservations in Washington, will be gravely and adversely affected by the decision from which this appeal is taken.

Before the passage of RCW 37.12.010 the police of the City of Toppenish could not arrest an Indian for a crime committed in that city; nor were Indian offenders subject to prosecution by state authorities. *Seymour v. Superintendent*, 368 U.S. 351 (1962). If the Indian or federal authorities were unavailable or indifferent no arrest or prosecution would take

place at all, regardless of the seriousness of the offense. Nor could an Indian doing business with a non-Indian, on non-Indian land, be sued in a state court on that transaction. *Williams v. Lee*, 358 U.S. 217 (1959)

While these jurisdictional distinctions may be of no constitutional significance,[3] they are of immense practical significance and were properly addressed by a legislature which sought to apply the law equally to all citizens while preserving a maximum of tribal self-government. That is not an irrational choice; on contrary, it was both highly rational and humane.

The Ninth Circuit panel completely misunderstood the statute in another important respect. It said:

> "* * * Under R.C.W. § 37.12.010, a Yakima Indian living on a parcel of non-fee land who is the victim of a crime has no law enforcement protection from Washington, but a Yakima Indian living on the adjoining parcel of fee land who is the victim of the same crime has law enforcement protection from Washington. * * *" (Appendix A, p. 33)

That statute regulates people's conduct and provides "protection" to people by regulating the conduct of others. Under the statute, if a non-Indian commits a crime against an Indian victim living on a parcel of non-fee land, the state *does* afford the Indian law enforcement protection. For that non-Indian would be subject, under RCW 37.12.010, to the full range of state criminal laws.

What the legislature decided in passing RCW

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[3] *U.S. v. Antelope*, ... U.S. ....., 45 U.S L.W. (April 19, 1977), discussed further at p. 25 infra.

37.12.010 with respect to that Indian living on a parcel of non-fee land, is this: "We will protect you from the non-Indian. But you must look to the federal government or the Yakima Indian Tribe for your protection from a fellow Indian, and you must do so because that is the choice that the Yakima Tribe has made for you.". The state did not rest its distinction between fee and non-fee lands on the basis of the difference in the "need by the land occupants for law enforcement." (Panel opinion, Appendix A) Rather, it based the distinction upon a desire to allow the tribes, if they wish, to regulate the conduct of their own members on non-fee land. It left the question of need by the land occupants for state law enforcement services up to the tribe itself. That decision was both rational and humane.

The choice which the state gave to the Yakima tribe was, by reason of the eight enumerated categories, not a complete one. The state made the decision that there were areas of subject matter jurisdiction which were so fundamental and important that they would not be left to tribal self-government. But what is irrational about such a decision?

C. The Opinion On Remand Is Inconsistent With Both Prior Opinions Of This Court And The En Banc Opinion Of The Ninth Circuit Court.

In its en banc opinion finding congressional authority for the partial assumption of jurisdiction under PL 280, the Ninth Circuit majority evidenced a clear and precise understanding of Congress' motivation in 1953. The court stated:

> "* * *
>
> "Congress, by vesting states with an option, evidenced that at that time it did not know how jurisdiction in such states should be arranged. Experimentation undoubtedly was expected and that is what occurred.
>
> "* * *
>
> "Nothing could be more reasonable than to assume that Congress anticipated that various jurisdictional arrangements would be developed in option states. And this is what happened. We suggest that Congress anticipated, in a broad sense, this general direction of events that occurred in the opinion states.
>
> "Nor do we believe that the danger of states assuming only the beneficial aspects of jurisdiction while rejecting those more burdensome was so clear and present that Congress in 1953 reasonably could not have considered vesting in opinion states the power to experiment. Indeed, the failure of Congress in 1953 to repeal earlier grants of partial subject matter jurisdiction clearly suggests the contrary. (citing 25 U.S.C. § 231) Of particular importance to this case is the fact that Washington's partial assumption of jurisdiction reflects quite burdensome undertakings not likely to be defrayed from revenues derived from Indians." (Appendix C, pp. 42, 43)

What the panel has now done on the other hand, is essentially to hold that in 1953 the United States Congress, in recognizing the variety of possible and reasonable jurisdictional patterns over Indians and Indian lands, itself violated the Equal Protection Clause in authorizing the states to assume less than full jurisdiction. This is entirely inconsistent with the majority's views in the *en banc* opinion, as well as the law expressed by this comt.

Not only has the Congress authorized the "checkerboard" pattern of state jurisdiction as recognized by the *en banc* opinion, *it has imposed such a pattern itself*, as recognized by this court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). This court held that the Lake Traverse Indian Reservation in South Dakota was completely terminated, and hence under state and not tribal and federal, jurisdiction. However, in commenting in note 3 on the effect of 18 USC 1151(c), which defines as "Indian country" "Indian allotments, the Indian titles to which have not been extinguished * * *", this court described an exception to the general pattern of state jurisdiction:

> "* * * We note, however, that § 1151(c) contemplates that isolated tracts of 'Indian country' may be scattered *checkerboard fashion* over a territory otherwise under state jurisdiction. * * *" (Emphasis ours.) 420 U.S. at 429, n.3.

Though the court observed that there would be many practical and legal conflicts between state and federal jurisdiction arising from such a situation, the resolution of which was not before it, it did not suggest that the situation was unconstitutional. But if the judgment is left to stand, it *is* unconstitutional, *at least in the Ninth Circuit.*

What is irrational for the Washington legislature must also be irrational for the United States Congress, and the hundreds, if not thousands, of jurisdictional distinctions existing in this nation based on a "land title classification" must fall. Such a radical change should not occur without a full and complete review by this court.

The most glaring inconsistency between the Court of Appeals' judgment and previous opinions of this court is presented in *United States v. Antelope*, ... U.S. ....., 45 U.S.L.W. 4837 (April 19, 1977), decided just ten days before the issuance of the panel opinion.

In *Antelope*, an enrolled Coeur d'Alene Indian was convicted by a federal court of burglary, robbery and the murder of a non-Indian within the boundaries of the Coeur d'Alene Indian reservation. The first degree murder conviction was based upon the felony murder provisions of 18 U.S.C. § 1111, made applicable to Indians by the Major Crimes Act, 18 U.S.C. § 1153. Under that rule the federal prosecutor was not required to prove premeditation and deliberation, while, if tried in the Idaho court, such intent would have been necessary elements of the crime. The Court of Appeals reversed on the ground that Antelope had been denied both equal protection and due process in that his conviction was racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, where it would have been necessary to prove intent. This court reversed holding that the federal statutes were not based on an impermissible racial classification, and that the challenged statutes did not otherwise violate equal protection. The court said:

> "* * * We have previously observed that

Indians indicted under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction. *Keeble* v. *United States*, 412 U.S. 205, 212 (1973). See 18 U.S.C. § 3242. Respondents were, therefore, subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave They do not, and could not, contend otherwise.

"There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim. Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, *United States* v. *Kagama*, 118 U.S. 375 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter.

"The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction, pursuant to a regulatory scheme that did not erect impermissible racial classifications; hence, no violation of the Due Process Clause infected respondents' convictions." 45 U.S.L.W. 4837.

While admittedly this court did not there directly discuss the equal protection issue in those terms, Antelope was prosecuted by the federal government, rather than the State of Idaho, under a jurisdictional system based upon the status of land. If no denial of equal protection existed under those circumstances, how could one be found here?

Thus the jurisdictional system adopted by the state involves no more denial of equal protection than did the system under which Mr. Antelope was convicted by the federal court for the murder of a non-Indian within the Coeur d'Alene reservation.

Because such jurisdictional differences are of "no constitutional significance" non-Indian residents of the Yakima Indian reservation could not claim to be denied the equal protection of the law prior to the enactment of RCW 37.12.010, regardless of the extreme unfairness which the system sometimes worked upon them. It would have been of no greater constitutional significance if Mr. Antelope had been tried in a state court in Idaho for the murder of a non-Indian citizen, on non-trust land within the Indian reservation. Yet that is precisely what the panel has held.

No one can legitimately claim to be denied equal protection under these circumstances. Assuming, arguendo, that *any* equal protection rights adhere in this situation, it is the non-Indian residents of the reservation who would be denied that protection if the panel opinion is allowed to stand.

CONCLUSION

Chapter 37.12 RCW, and particularly RCW 37.12.010, evidence a statutory jurisdictional scheme under which the State of Washington has attempted to assume jurisdiction in those areas most directly affecting its fundamental and overriding concern, while at the same time recognizing the legitimate

interests of the Indian tribes, and the members thereof residing within its borders, in the unique, historical and cultural status of the trust lands located within their reservations. This legislatively created distinction is rational, and, as evidenced by the record, has worked reasonably well since 1963. To now overturn that jurisdictional scheme would create immediate and severe disruptions in the jurisdictional system existing within the State of Washington, as well as other states located both within and without the Ninth judicial circuit. The far reaching results which would naturally flow from the Court of Appeals opinion cannot be derived from and are inconsistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the intent of Congress in enacting PL 83-280 in 1953 and the Washington state legislature's intent in attempting to fairly address areas of major and fundamental concern to the state.

Appellants respectfully submit that the federal question presented herein is substantial and warrants this court's review.

Respectfully submitted,

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APPENDIX A

CONFEDERATED BANDS AND TRIBES OF the YAKIMA INDIAN NATION, Appellant,

v.

STATE OF WASHINGTON, County of Yakima, Daniel J. Evans as Governor of the State of Washington and Individually, Slade Gorton, as Attorney General of the State of Washington and Individually, Les Conrad, Cliff Onsgard and Lenore Lambert as County Commissioners and Individually, Appellees.

No. 74-1225.

United States Court of Appeals, Ninth Circuit.

April 29, 1977.

In an action challenging partial assumption of criminal and civil jurisdiction in Indian lands, by the State of Washington, the United States District Court for the Eastern District of Washington, Charles L. Powell, J. (Deceased), rendered judgment from which the plaintiff Indians appealed. The Court of Appeals, 550 F.2d 443, after consideration en banc, remanded the case to the panel to determine constitutional questions. The Panel, Hufstedler, Circuit Judge, held that the Washington statute made use of a classification which failed to meet any formulation of the rational basis test, insofar, as to unconsenting tribes, the State assumed jurisdiction to the fullest extent possible in respect of fee land but assumed jurisdiction as to nonfee lands only with respect to eight subject matter categories. The statute thus violated the equal protection clause. There being no severability clause, the statute was invalid as a whole; the court could not assume that the State would have created a checkerboard pattern of civil jurisdiction, accepting civil jurisdiction over fee lands only.

Reversed.

1. Constitutional Law ⇐209

Congress cannot authorize state to violate equal protection clause. U.S.C.A. Const. Amend. 14.

2. Constitutional Law ⇐208(3)

Interest of Indians in effective criminal law enforcement on reservation cannot be characterized as "fundamental," for purposes of testing constitutionality of classification. 28 U.S.C.A. § 1362; RCWA 37.12.010; Act Aug. 15, 1953, 67 Stat. 588.

3. Constitutional Law ⇐249(2), 250.2(1) Indians ⇐27(2), 38(2)

Statute of State of Washington assuming criminal and civil jurisdiction over Yakimas' reservation lands made use of classification which failed to meet any formulation of rational basis test, insofar, as to unconsenting tribes, State assumed jurisdiction to fullest extent possible in respect of fee land but assumed jurisdiction as to nonfee lands only with respect to eight subject matter categories; statute thus violated equal protection clause. 28 U.S.C.A. § 1362; RCWA 37.12.010; Act Aug. 15, 1953, 67 Stat. 588.

4. Constitutional Law ⇐213.1(2)

Statute according different treatment to similarly situated persons on basis of criterion wholly unrelated to objective of the statute is denial of equal protection. RCWA 37.12.010; Act Aug. 15, 1953, 67 Stat. 588.

5. Constitutional Law ⇐208(1)

Rational basis test of constitutionality of classification applies to statutory

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classifications that do not affect fundamental rights. U.S.C.A.Const. Amend. 14; RCWA 37.12.010.

6. Statutes ⇐64(2)

There being no severability clause, statute of State of Washington partially assuming criminal and civil jurisdiction over Yakimas' reservation lands was invalid as a whole; court could not assume that State would have created checkerboard pattern of civil jurisdiction, accepting civil jurisdiction over fee lands only. U.S.C.A.Const. Amend. 14; RCWA 37.12.010.

Appeal from the United States District Court for the Eastern District of Washington.

Before HUFSTEDLER, MOORE,* and WRIGHT, Circuit Judges.

OPINION

ON REMAND FROM THE COURT EN BANC

HUFSTEDLER, Circuit Judge:

The Confederated Bands and Tribes of the Yakima Indian Nation ("Yakimas"), invoking federal jurisdiction under 28 U.S.C. § 1362, brought this suit challenging the statutory and constitutional validity of the State of Washington's assumption of criminal and civil jurisdiction over the Yakimas' reservation lands. The district court rejected the Yakimas' statutory and constitutional contentions, in part relying upon *Quinault Tribe of Indians v. Gallagher* (9th Cir. 1966) 368 F.2d 655 ("Quinault II"). Our court *sua sponte* ordered this case *en banc* for the limited purpose of deciding whether to overrule that portion of *Quinault II* which states that PL–280[1] authorized Washington's statutory partial assumption of jurisdiction (R.C.W. § 37.12.010). The majority of the court adhered to *Quinault II*, upholding R.C.W. § 37.12.010 against statutory attack. (*Confederated Bands and Tribes v. Washington* (9th Cir. en banc 1977) 550 F.2d 443 [1977].) The *en banc* court remanded the case to the panel to determine the constitutional questions raised by the Yakimas.

The Washington statute[2] divides jurisdiction into two broad categories: (1) jurisdiction assumed with the consent of the affected tribes; (2) jurisdiction assumed without tribal consent. As to unconsenting tribes, Washington assumed jurisdiction to the fullest extent possible under PL–280 in respect of fee land, but assumed jurisdiction as to non-fee lands only with respect to eight subject matter categories (compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public thoroughfares). The Yakimas' reservation is a checkerboard of fee owned and non-fee owned land.

The Yakimas challenge the constitutional validity of this statute on both due process and equal protection grounds. They contend that the eight categories of subject matter jurisdiction assumed are vague and impermissibly over- and underinclusive and that the statute, on its face and as applied, deprives them of equal protection. The impact of territorial checkerboarding and fragmentation of subject matter jurisdiction creates a host of classifications that present difficult equal protection problems.[3] We need to grasp firmly only one of these constitutional nettles—the classification based on the status of title to the land upon which an alleged criminal offense occurs. Under R.C.W. § 37.12.010, a Yakima Indian living on a parcel of non-fee land who is the victim of a crime has no law enforcement protection from Washington, but a Yakima Indian living on the adjoining parcel of fee land who is the victim of the same crime has law enforcement protection from Washington. We hold that Washington's partial[4] assumption of jurisdiction based upon this land title classification cannot withstand the Yakimas' equal protection attack, and we strike down Section 37.12.010.

[1] Before we analyze the title-based classification, we dispose of some preliminary questions. The first is the impact upon the equal protection issue of the court's *en banc* decision that Washington's partial assumption scheme was authorized by PL–280. At the risk of restating the obvious, a determination that Congress permitted Washington to enact the partial assumption scheme of Section 37.12.010 is not a pronouncement that the authorized scheme is constitutional. The *en banc* court did not purport to reach any constitutional issue. It is elementary, of course, that Congress cannot authorize a state to violate the Equal Protection Clause, any more than a state, without any federal involvement, can violate the Equal Protection Clause. (*Cf. Dandridge v. Williams* (1970) 397

* Honorable Leonard P. Moore, Senior United States Circuit Judge, Second Circuit, sitting by designation.

1. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588–90.

2. R.C.W. § 37.12.010:

"*Assumption of criminal and civil jurisdiction by state.* The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways:

Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."

3. *E. g.*, When an adult Indian and a juvenile Indian are charged with an offense committed on non-fee land, is it a denial of equal protection for the state to prosecute the juvenile but not the adult? To uphold the statute, we would have to analyze and approve each classification drawn by it.

4. Congressional consent in PL–280 was not consent to a total assumption by the States. Certain specialized areas were specifically retained by the Federal Government in PL–280. (*E. g.*, fishing rights guaranteed by treaty; restraints on state taxation of tribal trust land.) In addition, the Supreme Court has recently interpreted PL–280's consent to assumption of civil jurisdiction to be limited to application of state civil law in court proceedings rather than consent to the "[extension of] general state civil regulatory authority . . . to govern Indian reservations." (*Bryan v. Itasca County* (1976) 426 U.S. 373, 387, 96 S.Ct. 2102, 2110, 48 L.Ed.2d 710.) We use "full" jurisdiction to indicate the maximum Washington could have validly assumed under PL–280. Under the *Bryan* interpretation Washington could have gone beyond its assumption of criminal jurisdiction and exercised criminal jurisdiction over the non-fee lands as well, and thus Washington's assumption was "partial."

U.S. 471, 483, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 ("Although a State may adopt a maximum grant system in allocating its fund available for AFDC payments without violating the [Social Security] Act, it may not, of course, impose a regime . . . in violation of the Equal Protection Clause of the Fourteenth Amendment."); *Shapiro v. Thompson* (1969) 394 U.S. 618, 641, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 ("Congress may not authorize the States to violate the Equal Protection Clause.").)

[2] Second, we recognize that the concepts of fundamental rights and strict scrutiny are inapplicable to the title-based classification system that we are testing. No matter how desirable may be effective criminal law enforcement on the reservation, we do not believe that the Indians' interest in that public service can be characterized as "fundamental." (*See, San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 29–39, 93 S.Ct. 1278, 36 L.Ed.2d 16.) Although Section 37.12.010 has racial implications because its impact is limited to Indian reservations, the classification based on fee and non-fee lands within reservations is not on its face racially discriminatory, and, as far as the record reveals, was not adopted to mask racial discrimination. Both Indians and non-Indians live on both fee and non-fee land within the Yakima reservation. (*Cf. Jefferson v. Hackney* (1972) 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285. *See generally, United States Dep't of Agriculture v. Moreno* (1973) 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782; Ely, "Legislative and Administrative Motivation in Constitutional Law," 70 Yale L.J. 1205 (1970).)

[3, 4] Third, we need not here decide whether the Supreme Court continues to espouse the traditional two-tier equal protection approach,[5] because Washington's title-based classification fails to meet any formulation of the rational basis test. (*See, e. g., Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520; *Reed v. Reed* (1971) 404 U.S. 71, 75–76, 92 S.Ct. 251, 30 L.Ed.2d 225; *McDonald v. Board of Election Commissioners* (1969) 394 U.S. 802, 808–09, 89 S.Ct. 1404, 22 L.Ed.2d 739; *McGowan v. Maryland* (1961) 366 U.S. 420, 425–26, 81 S.Ct. 1101, 6 L.Ed.2d 393.) A statute according different treatment to similarly situated persons on the basis of a criterion wholly unrelated to the objective of the statute is a denial of equal protection.

[5] The operative criterion of the criminal jurisdiction classification in issue is the status of title. The purpose of the statute, as advanced by the Washington Attorney General, in limiting criminal jurisdiction over non-fee lands to offenses within the eight enumerated subject areas[6] is that these areas are ones "in which the state has the most fundamental concern for the welfare of those least able to care for themselves . . . ." (C.T. at 586.) Washington argued[7] that jurisdiction was limited to areas of "fundamental and overriding" concern. It did not argue that any other purpose was intended to be served by this limited jurisdiction over criminal acts committed on reservations, and no other rationale leaps to our eyes.[8] (*See,* Gunther, "The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" 86 Harv. L.Rev. 1, 20–21 (1972).)

We can detect no rational connection between the stated purpose and the distinction based on land title within the reservation. The state's interest in enforcing criminal law is no less "fundamental" or "overriding" on non-fee lands than on fee lands. An overriding concern with and responsibility for public order necessarily embrace both, once the state undertakes to assume any jurisdiction over either. No showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement. Moreover, no relationship has been suggested or shown between the interest and the ability of the state to provide law enforcement and the fee—non-fee status of the land within the reservation. This checkerboard jurisdictional structure based on a selection by land title is the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." (*Reed v. Reed* (1971) 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225.) Accordingly, the partial territorial assumption of criminal jurisdiction under R.C.W. § 37.12.010 is a denial of equal protection.

[6] Can the invalidated portion of Section 37.12.010 be separated from the remainder of the statute, or does the whole statute fall?[9] The Washington legislature could have severed these provisions, but we cannot do so. The statute contains no severability clause.[10] We are unable to attribute to Washington a willingness to include more jurisdiction than it undertook partially to assume.[11] When Washington chose to be expansive

5. *Compare Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307, 318–22, 96 S.Ct. 2562, 49 L.Ed.2d 520 (Marshall, J., dissenting) *with Craig v. Boren* (1976) — U.S. —, 97 S.Ct. 451, 50 L.Ed.2d 397 (Powell, J., concurring).

6. Some of the subject areas are not likely to define offenses or to contain criminal sanctions; but some, *e. g.*, compulsory school attendance, juvenile delinquency, and operation of motor vehicles, do partake of criminal jurisdiction and criminal sanctions to some extent.

7. Yakima County, a co-defendant, advanced a different theory of the statute's purpose, but the record reveals that the State never adopted this additional rationale. The defendants' consolidated brief on appeal does not advance a legislative purpose and argues only that *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, is "[d]ispositive . . . of the tribe's equal protection argument . . . ." (Brief for Appellees at 51.) The appellees are wrong in this contention because it is based on the erroneous premise that "[w]here the United States Supreme Court has found classifications or distinctions to be irrational and thus violative of the Equal Protection Clause, basic and fundamental rights were involved." (*Id.*) While we agree that strict scrutiny is not applicable to the one classification upon which our analysis focuses, the rational basis test applies to statutory classifications that do not affect fundamental rights. (*E. g., Reed v. Reed* (1971) 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 ("right" to be appointed personal representative of son's estate).)

8. We have no reason to believe that Washington's Attorney General, in making the argument, was "selecting a convenient, but false, post-hoc rationalization." (*Craig v. Boren* (1976) — U.S. —, 97 S.Ct. 451, 50 L.Ed.2d 397.)

9. Assuming *arguendo* that the issue of severability is to be determined by state standards, the statute is unseverable according to results of the tests advanced in *State v. Anderson* (1972) 81 Wash.2d 234, 501 P.2d 184.

10. Under Washington law a severability clause is deemed conclusive unless, by facts subject to judicial notice, it can be said that the declaration of legislative intent is on its face obviously false. (*Id.*)

11. The statute fails under the test of whether "the legislature would have passed the remaining portion of the statute without the unconstitutional portion". (*Id.* at 501 P.2d 186. *See also United States v. Johnson* (1968) 390 U.S. 563, 585, 88 S.Ct. 1231, 20 L.Ed.2d 132 (*accord,* applying federal standards).)

in assumption, it evidenced that intention. But in the statute under attack, it expressly limited its assumption to partial jurisdiction. We do not believe that Washington would have attempted to regulate such categories of jurisdiction as juvenile delinquency without criminal jurisdiction or the availability of criminal sanctions. Nor do we believe that Washington would have undertaken to regulate such subjects as "dependent children," "adoption proceedings," or "public assistance," without regulating "juvenile delinquency." Finally, without criminal jurisdiction over offenses on the reservation and with no civil jurisdiction over events on non-fee lands, we cannot assume that Washington would have created a checkerboard pattern of civil jurisdiction, accepting civil jurisdiction over fee lands only. In short, the remainder of the statute cannot be rescued by a simple excision; the whole statute must be rewritten, a task manifestly beyond our constitutional competence.

REVERSED.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1225
CLP DC No. 2732

ORDER

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION, *Appellant*,

v.

STATE OF WASHINGTON, et al., *Appellees*.

Before: HUFSTEDLER, MOORE,* and WRIGHT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Wright have voted to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Leonard P. Moore, Senior United States Circuit Judge, Second Circuit, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellant,

vs.

STATE OF WASHINGTON; COUNTY OF YAKIMA; DANIEL J. EVANS as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, CLIFF ONSGARD and LENORE LAMBERT as County Commissioners and individually,
Appellees.

No. 74-1225

OPINION

[January 21, 1977]

Appeal from the United States District Court
for the Eastern District of Washington

Before: CHAMBERS, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED and KENNEDY, Circuit Judges.

SNEED, Circuit Judge:

The Yakimas argue before this court en banc that PL-280 did not authorize Washington to assume partial jurisdiction and that REV. CODE WASH. § 37.12.010 is accordingly invalid.

We must first decide whether the Supreme Court's summary dismissals in *Tonasket v. Washington,* 420 U.S. 915 (1975) and *Makah Indian Tribe v. Washington,* 397 U.S. 316 (1970) foreclose the issue. We can dispose of *Tonasket* quickly because the Supreme Court of Washington did not address the partial assumption question (as it did the disclaimer issue) after the United States Supreme Court vacated its prior decision and remanded the case for reconsideration in the light of *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973); accordingly,

the partial assumption issue was not before the Supreme Court when it dismissed the second appeal. *Makah* is somewhat more troublesome because *Makah* clearly involved a partial assumption of jurisdiction under REV. CODE WASH. § 37.12.010 in connection with highways. We think *Makah* is not dispositive for two reasons. First, the jurisdictional statement to the Supreme Court did not specify the partial assumption issue as a "Question Presented," and partial assumption was mentioned only in passing in the supporting text. Second, the State's motion to dismiss or to affirm was directed to the disclaimer issue. Accordingly, we construe the dismissal order to resolve the disclaimer issue only.

Washington's primary reliance is placed on the following language from *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 655 (9th Cir. 1966) (hereinafter *Quinault II*):

> "The third claim which plaintiffs purport to state in their complaint is that chapter 36, Laws of 1963, amending chapter 240, Laws of 1957, is void because it represents only a partial assumption of state jurisdiction over Indian reservations, whereas Public Law 280 does not authorize partial assumption of jurisdiction.
>
> ". . . We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. In chapter 240, Laws of 1957, this Indian resolution and governor's proclamation procedure applied to all exertions of state jurisdiction.
>
> "In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280. If the Quinault Tribe of Indians feels aggrieved because state jurisdiction is not presently being exerted to the full extent possible under chapter 36, all it has to do is provide the governor with a tribal resolution of the kind called for in section 5 of that act (RCW 37.12.021). A governor's proclamation would necessarily follow, and a full exertion of state jurisdiction would be achieved." 368 F.2d at 657-58.

The ultimate holding of *Quinault II* supports the State's argument, and we choose to affirm it. While *Quinault II*, strictly speaking, avoided the assumption-of-partial-jurisdiction issue by treating Washington's assumption as total, it is reflective of a long-standing opinion that PL-280 authorizes the assumption of partial subject matter, and partial geographic, jurisdiction.[1] Examination of the relevant legislative history does not disprove this interpretation of PL-280 and, in fact, provides some degree of support. More critically, reversal of *Quinault II* at this late stage, along with a new interpretation of PL-280, could lead to unfortunate law enforcement problems for thousands of native Americans.

I.

To hold, as the dissent would have us do, that any *partial* assumption of *criminal* jurisdiction by the states is violative of PL-280 would overturn the jurisdictional systems under which live approximately 16,000 Indians in the State of Washington and 5,000 Indians in Idaho. The jurisdictional systems under which 115,000 Indians in Arizona and 22,000 Indians in Montana live would also be jeopardized.[2] The effects of such an immediate jurisdictional upheaval would be far-reaching and quite unpredictable for the approximately 158,000 Indians potentially affected by this decision.

For example, Washington has performed certain services since 1963. Doubts about whether tribal or federal authorities would be ready to step in immediately are quite reasonable. Consider highway traffic law enforcement and juvenile delinquency, two specific areas where state jurisdiction would be invalidated under the view of the dissenters. Both are complicated fields. Patrol cars and officers are necessary if the highways are to be efficiently patrolled. Skilled personnel, as well as specialized detention facilities, are needed to handle the problems presented by the delinquency of juveniles. It is very doubtful that the tribe or the federal government immediately could provide these

[1] *See infra* p. 7. *See also* Tonasket v. Washington, 488 P.2d 281 (Wash. 1971); Makah Indian Tribe v. Washington, 457 P.2d 590 (Wash. 1969).

[2] *See infra* pp. 8-9. All population statistics as of March 1970 in T. Taylor, The States and Their Indian Citizens, app. B, at 176 (Bureau of Indian Affairs 1972).

resources. Even if the states are providing only minimal services, it is unlikely that tribal or federal authorities could equal or surpass that level in the near future.

Other "option states" within the circuit would confront similar uncertainties and confusion. "Option states" not within the circuit, moreover, could not view such action with indifference. Until the dissent's position was acted upon by their circuit, and possibly ruled upon by the Supreme Court, any partial assumption of jurisdiction, not arranged pursuant to procedures of the 1968 legislation, would be under a cloud.[3]

[3] To grasp the magnitude of the problem with which we are confronted, there are nineteen states having Indians residing therein which can be designated as "option states." Of this, eight have disclaimers of Indian jurisdiction in their state constitutions (Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington). S. Rep. No. 699, 83rd Cong., 1st Sess. 6 (1953). Eleven, on the other hand, have no such constitutional disclaimers (Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, and Wyoming). T. Taylor, *supra* note 2, at 176. The eight are authorized by section 6 of PL-280 "to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction." The eleven, together with such of the eight as have removed their constitutional impediments, under section 7 of PL-280 are permitted "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

The responses of these nineteen states have not been uniform. Six states assumed some kind of partial jurisdiction (Arizona, Idaho, Iowa, Montana, North Dakota, and Washington). Ten of the remaining states have not assumed any effective jurisdiction (Colorado, Kansas, Louisiana, Michigan, Mississippi, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming). Two other states acted after the 1968 amendments to PL-280 and so are covered by a different statutory scheme (Nevada and Utah). One state assumed complete jurisdiction (Florida). Even among the states assuming partial jurisdiction, there have been a variety of approaches. Washington's plan is adequately described in the dissent, *infra* at pp. 12-13. Idaho, in 1963, assumed partial subject matter jurisdiction in both the civil and criminal areas. Nevada originally adopted a county option approach but, following the 1968 legislation by Congress, returned all previously assumed jurisdiction if the tribe refused to consent to its continuation. Montana, in 1963, assumed only criminal jurisdiction over the Flathead Indian Reservation. Arizona, in 1967, despite its constitutional disclaimer clause, assumed jurisdiction only with respect to air and water pollution control.

II.

Despite these consequences we would not hesitate to overrule *Quinault II* if it were plainly and unequivocally inconsistent with the applicable legislative history of PL-280. But it is not. At worst, this history simply does not directly address the partial assumption issue.[4] There are, however, aspects of PL-280 and its legislative history that suggest assumption of partial jurisdiction is valid and that *Quinault II*, as here interpreted, is sound.

First of all, partial geographic jurisdiction was specifically provided by the Act with respect to certain mandatory states, by excluding specific reservations for coverage.[5] There is no reason to suppose that option states were not to have the power to be similarly flexible. Exclusion of an entire reservation is different, of course, from "checker-boarding." There is, however, nothing to indicate that a state given the option to assume jurisdiction was required either to exclude entire reservations or to assume jurisdiction with respect to all Indian country within its territorial limits. Congress, by vesting states with an option, evidenced that at that time it did not know how jurisdiction in such states should be arranged. Experimentation undoubtedly was expected and that is what has occurred.

It is also reasonable to conclude that experimentation with respect to subject matter jurisdiction was intended. This is indicated by the fact that the Department of Interior conferred extensively with the representatives of mandatory states and the Indian tribes before presenting a bill to Congress in 1953.[6] Both the mandatory states and the tribes therein had agreed to an assumption of complete civil and criminal jurisdiction prior to

[4]An exhaustive review of the legislative history surrounding PL-280 concludes that "[t]here is nothing in the legislative history surrounding the enactment of PL-280 that definitely indicates whether Congress intended to permit partial jurisdiction by subject matter." Goldberg, *PL-280: The Limits of State Jurisdiction Over Reservation Lands*, 22 U.C.L.A. L. Rev. 535, 554-555 (1975).

[5]The Red Lake Reservation in Minnesota, the Warm Springs Reservation in Oregon, and the Menominee Reservation in Wisconsin were all specifically excluded.

[6]S. Rep. No. 699, 83rd Cong., 1st Sess. 6-7 (1953)—letter from Mr. Lewis, Assistant Secretary of the Interior to Mr. Miller, Chairman of the House Interior and Insular Affairs Committee.

submission. However, very few of the option states and tribes therein were consulted. By failing to consult extensively and by vesting option states with the power to assume jurisdiction, it is reasonable to assume that Congress was prepared to permit various jurisdictional arrangements to be developed at the state level. No restraints on these arrangements were imposed by PL-280.

To assume no such restraints with respect to geography or subject matter were intended is consistent with the assimilative thrust of the 1953 legislation. Congress in PL-280 intended to relinquish federal jurisdiction over Indian people residing on reservations as quickly as possible. Relinquishment in option states simply had not been worked out in 1953.[7] So far as Congress then knew it might never be worked out; but it is clear that Congress had hopes. Nothing could be more reasonable than to assume that Congress anticipated that various jurisdictional arrangements would be developed in option states. And this is what happened. We suggest that Congress anticipated, in a broad sense, this general direction of events that occurred in the option states.

Nor do we believe that the danger of states assuming only the beneficial aspects of jurisdiction while rejecting those more burdensome was so clear and present that Congress in 1953 reasonably could not have considered vesting in option states the power to experiment. Indeed, the failure of Congress in 1953 to repeal earlier grants of partial subject matter jurisdiction clearly suggests the contrary.[8] Of particular importance to this case is the fact that Washington's partial assumption of jurisdiction reflects quite burdensome undertakings not likely to be defrayed from revenues derived from Indians.

[7]*Id.* at 6.

[8]25 U.S.C. § 231 allows the Secretary of the Interior to promulgate regulations permitting state authorities to enter Indian tribal lands, reservations and allotments for the purpose of making inspection of health and educational conditions and enforcing sanitary and quarantine regulations. Though no regulations were ever promulgated under this statute, it does show a Congressional intent to allow partial subject matter jurisdiction. An amendment to the statute in 1946 authorized the states "to enforce the penalties of state compulsory school attendance laws against Indian children and parents." 25 U.S.C. § 231(a). This provision evidenced a further intent to allow the states to deal with particular subject matter areas. The failure to repeal these provisions in 1953 suggests a continuing intent on the part of Congress to allow the option states to experiment with partial subject matter jurisdiction.

This fiscal imbalance, undoubtedly present under Washington's scheme, illumines an aspect which strongly suggests recognition by Congress of the necessity to permit experimentation with partial assumptions. This aspect is that the propensity of a state to assume jurisdiction is a function of its fiscal strength and the magnitude of the burden assumption imposes. It follows that the propensity of each state is different. Only by permitting the option states to experiment with assumptions of partial jurisdiction could Congress allow each state to fit its burdens to its capacities.

Another indication that partial assumption is valid appears in the meaning given the statute by the Department of Interior, the department closely involved in drafting PL-280 and having the primary responsibility for Indian affairs.[9] During hearings in connection with enactment of the 1968 amendments to PL-280, which explicitly permit partial assumptions when the Indians give their consent, an Assistant Secretary of the Interior in a letter to Representative Aspinall observed that the 1968 amendments would make "explicit an authority which we believe is now implicit—an authority to assume partial or piecemeal jurisdiction, either by geographic area or by subject matter." *Hearings on HR 15419 Before the Subcom. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess., ser. 23, at 25 (1968). Even more directly relevant is that the letter observed approvingly that Washington, Idaho, and Nevada had already assumed partial jurisdiction. This court has previously cited this letter as evidence of the Congressional intent in enacting PL-280. Though the language in *United States v. Burland*, 441 F.2d 1199 (9th Cir. 1971), endorsing the Department of the Interior's position is probably dictum, it is another indication of the strength of that position.[10]

In summary, the applicable legislative history of PL-280 provides reasonable support for *Quinault II*. We see no reason to

[9]As the agency most closely tied to the drafting and administration of Indian laws, its interpretation of a statute should be given "great weight." *See* United States v. Jackson, 280 U.S. 183, 193 (1930); Stevens v. Comm'r, 452 F.2d 741, 746 (9th Cir. 1971).

[10]Against this expression of the Department of Interior's view is the statement by Representative Aspinall, quoted by the dissent, *infra* at p. 21. This statement asserted that the 1968 amendment permitting the assumption of partial jurisdiction represented a change in the law. Since

overturn a reasonable interpretation of an ambiguous statute understood for a generation to be the law when the consequences of so doing are so uncertain and far-reaching.

III.

We recognize that Washington's checker-boarding of criminal jurisdiction might appear particularly inefficient and that its elimination may be desirable. However, it would be difficult to limit an opinion overruling *Quinault II* merely to such a scheme. An overruling of *Quinault II* inevitably would cast grave doubt on Montana's 1963 assumption of criminal jurisdiction over only the Flathead Indian Reservation.[11] There is nothing in the relevant legislative history to indicate that it was the intent of Congress to proscribe assumptions of jurisdiction geographically partial *within* reservations but to approve assumptions of jurisdiction geographically partial *between* reservations.

Nor would it be easy to limit such a holding to the proscription merely of partial assumptions of *criminal* jurisdiction. To validate assumptions of partial civil jurisdiction in the face of such a holding would sink to the level of clumsy and heavy-

Quinault II, decided in 1966, is not an unreasonable interpretation of an imprecise statute, Representative Aspinall's statement cannot be accepted as entirely accurate.

Be that as it may, his statement is not supported by the letter of Deputy Attorney General Warren Christopher cited by the dissent, *infra* at p. 21, n. 20. This letter expressed doubt about the wisdom of recognition by the 1968 amendments of assumptions of partial criminal jurisdiction. Its relevant portion merely observed that the Department of Justice "has in the past emphasized the desirability from a law enforcement point of view of not adding to the complexity of the existing jurisdictional structure. For this reason, states and consenting tribes should be encouraged to shift jurisdictional responsibility en bloc whenever possible." *Hearings on H.R. 15419, supra* at 28.

The best that the dissent properly can make of these bits of history is that Representative Aspinall thought the 1968 legislation changed PL-280 despite the contrary authority of *Quinault II* and that perhaps there was a difference between Justice and Interior with respect to the policy of partial assumptions of criminal jurisdiction. Deputy Attorney General Christopher's letter cannot be construed as an official interpretation by the Department of Justice of the legality of partial assumptions of criminal jurisdiction under the 1953 legislation.

[11]MONT. REV. CODE ANN. § 83-801 (1966).

handed legislation by adjudication. Moreover, there exists nothing in the legislative history to suggest that partial assumption in the civil area is proper while improper in the criminal area. In addition, the administration of such a distinction would prove to be quite complex. The distinction between civil and criminal jurisdiction is not easy to draw.[12] Thus, assumptions of partial civil jurisdiction would be challenged and, after time and expense, very likely would fall.[13] With this result would arise retroactivity problems more complex than we can now imagine.

Finally, a general and all encompassing proscription of assumptions with respect to *portions* of the Indian country within a state would invalidate state statutory schemes in which such assumptions are conditioned upon consent of the Indians. As already indicated, Washington, Idaho, and Montana have such legislation. To invalidate only those partial assumptions where consent has not been given would be either to apply improperly the 1968 Amendments retroactively or to engraft on PL-280 a

[12]In determining what aspects of the Bill of Rights apply to a particular judicial proceeding, the courts have often been plagued by the question of whether the underlying statute is "criminal" or "civil." *See, e.g.*, Note, *The Quasi-Criminal Ordinance Prosecution in Illinois*, 68 Nw. U.L. Rev. 566 (1973). Such determinations are not always simple. An example of the difficulties that could arise if we were to hold only partial assumptions of *criminal* jurisdiction invalid is provided by Arizona's assumption of jurisdiction within Indian territory over air and water pollution control. *See* Ariz. Rev. Stat. Ann. §§ 36-1801, 36-1865 (1974). While this jurisdiction at first glance might be assumed to be civil in nature, Arizona provides that violators of the air and water standards will be guilty of misdemeanors and, in some cases, subject to a penalty of from $50 to $1,000 per day. Ariz. Rev. Stat. Ann. §§ 36.789.01, 36-1720, 36-1864 (1974). Does this make the jurisdiction, at least in part, criminal in nature? Should this turn on whether Arizona describes its fine as a "criminal penalty" or a "civil fine"?

Rev. Code Wash. § 37.12.010 extends state jurisdiction over "compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles upon the public streets, alleys, roads and highways." Which of these categories, if any, are wholly civil or wholly criminal, and how to divide up the categories that are part civil, part criminal, are questions not easily answered.

[13]This would invalidate Arizona's assumption of jurisdiction over air and water pollution control should that assumption be regarded as civil. *See* Ariz. Rev. Stat. Ann. §§ 36-1801, 36-1865 (1974). *See* note 12 *supra*.

requirement of consent which all concede was not intended by Congress. Invalidation where consent has been given, however, borders on perversity when it is recalled that the 1968 amendments permit such assumptions. Finally, to invalidate *all* geographically partial assumptions for the sole purpose of requiring renegotiation of the state-tribe relationship under the 1968 amendments would involve us in an undertaking essentially legislative in character. We decline to undertake a function so incompatible with traditional restraints on judicial action.

The power of the United States, acting executively or congressionally, to rescue any and all Indians from the states imposing their jurisdiction improperly cannot be doubted. These branches of our Government are not insensitive to Indians.[14] Our intervention in this case would be both redundant and unwise.

We adhere to *Quinault II* and the dictum of *United States v. Burland*, 441 F.2d 1199 (9th Cir. 1971) and remand this case to the panel before which it initially was heard to consider the other issues involved in this case.

REMANDED.

HUFSTEDLER, Circuit Judge, dissenting, with whom Circuit Judges Browning, Duniway, Ely and Wallace concur.

The Confederated Bands and Tribes of the Yakima Indian Nation ("Yakimas"), invoking federal jurisdiction under 28 U.S.C. § 1362, brought this suit challenging the statutory and constitutional validity of the State of Washington's assumption of criminal and civil jurisdiction over the Yakimas' reservation lands and sought a declaration that the assumption was void, or if not void, that the assumption gave the State concurrent rather

[14]In a meeting with Indian leaders on July 16, 1976, President Ford committed himself "to furthering the self-determination of Indian communities . . . without terminating the special relationship between the Federal Government and the Indian people." He also supported the concept "of allowing Indian tribes to determine whether they and their members in addition to being under tribal jurisdiction should be under State or Federal civil and criminal jurisdiction." The Departments of Justice and Interior are currently drafting legislation which would accomplish these goals. 12 Weekly Compilation of Presidential Documents, No. 30, at 1171-1172 (July 26, 1976).

than exclusive jurisdiction. The district court rejected their contentions on a number of grounds, and the Yakimas appeal from the adverse judgment.

On appeal the Yakimas contend: The State's assumption of jurisdiction is invalid because the State did not comply with a statutory condition precedent to assumption imposed by Congress in PL-280[1] because the State did not amend her constitutional disclaimer of jurisdiction over the Yakimas, and she did not obtain tribal consent to her assumption of jurisdiction. If the State could have assumed complete jurisdiction over the Yakimas, R.C.W. § 37.12.010, the assumption of partial jurisdiction is invalid because it is unauthorized by PL-280. Even if PL-280 purported to authorize partial assumption, R.C.W. § 37.12.010 is unconstitutional as applied to the Yakimas.

The court *sua sponte* ordered this case *en banc* for the purpose of deciding whether to overrule that part of *Quinault Tribe of Indians v. Gallagher* (9th Cir. 1966) 368 F.2d 655 (*"Quinault II"*), stating that PL-280 authorized Washington's partial assumption of jurisdiction over Indian reservations. The majority of the court refuses to overrule this part of *Quinault II* and holds that PL-280 authorized the multiple partial assumptions at issue. In my view, the reasoning and the result of *Quinault II* are wrong and should be overturned. The majority's decision to the contrary is based on a misreading of the statutory scheme, a misinterpretation of the legislative history, and some strongly worded, but factually unsupported fears about the impact of correcting our past mistakes in *Quinault II*. The end product is the perpetuation of some bad law, and the enforced and otherwise unnecessary confrontation with some difficult constitutional issues.[2]

The *Quinault II* issue that we took *en banc* was wrongly decided. *Quinault II* decided that R.C.W. § 37.12.010 was not a partial assumption of jurisdiction because the Indians could always resolve to consent to full jurisdiction, and if the tribe did so, the Governor had to issue the statutory proclamation, which would result in jurisdiction to the full limits of Congress'

[1]Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90; "PL-280."

[2]The constitutional issues must be resolved by the original panel following remand by the court *en banc*.

consent. R.C.W. § 37.12.010, however, is a partial assumption statute and it cannot become something else because the tribe could avoid its provisions altogether by following a different statute. But, of greater moment, a potential for consent to complete state jurisdiction is no answer to the key questions whether Congress permitted any partial assumption by a disclaimer state, like Washington, or whether Congress ever gave Washington the power to limit the Indians' choices to complete jurisdiction that they did not want or partial jurisdiction that they did not want either.

Quinault II failed to recognize that Washington's assumption scheme involves multiple partial assumptions: (1) assumption of jurisdiction of less than all Indians, tribes, and reservations; (2) partial territorial assumption within reservations; and (3) partial assumption of subject matter jurisdiction within reservations.

I have no difficulty in upholding the validity of reservation-by-reservation or tribe-by-tribe assumptions under PL-280, and, to the extent that the majority opinion rests on that conclusion, I agree with it.[3] That issue was never addressed in *Quinault II*. However, the second and third types of partial assumption are not valid under PL-280.

I

I start with a brief statutory sketch of Washington's assumption schemes. In 1957, the legislature enacted chapter 240, Laws of 1957 (R.C.W. § 37.12) which allowed the Indians to request the governor to assume jurisdiction, with exceptions here not pertinent, whereupon the governor was to issue a proclamation

[3]The exception of well-governed reservations from total assumption of jurisdiction in mandatory states is entirely consistent with the overriding concern of Congress to cure the breakdown in criminal law enforcement on the reservations. (The excepted reservations were Red Lake Reservation in Minnesota, Warm Springs Reservation in Oregon, and Menominee Reservation in Wisconsin.) Congress' attention was focused for this purpose reservation by reservation, rather than state by state. The genesis of PL-280 was in individual state by state bills, which at first did not include any exceptions. *See* Hearings on H.R. 459, H.R. 3235, and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs on State Legal Jurisdiction in Indian Country, 82d Cong., 2d Sess., ser. 11 (1952).

confirming the assumption. In 1963, Washington amended her assumption statute dividing jurisdiction into two broad categories: (1) jurisdiction assumed with the consent of the affected tribes; (2) jurisdiction assumed without tribal consent. In the first category, upon tribal resolution and gubernatorial proclamation, the State would assume jurisdiction over "all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state." (R.C.W. § 37.12.020, *recodified as* R.C.W. § 37.12.021, Wash. Laws. 1963, ch. 36) As to nonconsenting tribes, Washington assumed jurisdiction to the fullest extent permissible under PL-280 in respect of fee land, but she assumed jurisdiction as to non-fee lands ("tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States") only in respect of eight categories of subject matter (compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads, and highways). (R.C.W. § 37.12.010.) These statutes are partial in that they authorize assumptions reservation by reservation. As to nonconsenting tribes, Washington divided fee from non-fee lands and assumed less than all subject matter jurisdiction on non-fee lands.

The majority opinion decides that Congress authorized Washington to assume partial geographic jurisdiction and partial subject matter jurisdiction within a single reservation. As the majority acknowledges, PL-280 does not say so; indeed, Congress did not plainly speak its mind one way or the other. We must seek congressional intent from the hints of PL-280 and its later amendments and from such congressional policies as can be identified from the legislative history.

I realize that defining congressional policy is not an easy task because Congress has never formulated a coherent policy toward Indians. It has wavered between and among federal dependence, assimilation, and autonomy. In pursuit of one policy, rather than another, and sometimes adopting antithetical policies at the same time, Congress has kept, given, and shared jurisdiction with the states over Indian affairs. The end product has been and still is

confusion. However, no confusion exists on the point that history supplies no support for the majority's conclusion that Congress intended the states to experiment with partial jurisdiction. The failure of the Department of Interior to consult with option states or with nonconsenting Indians had nothing to do with some kind of experimental proclivities in departmental or congressional minds. On the contrary, it was further evidence of departmental and congressional insensitivity toward Indians. As far as the legislative history reveals, assimilation as a means to "resolve" Indian problems was relatively strong in 1953 when PL-280 was enacted. But of greater moment were the pressures and counterpressures from states who wanted the benefits of total jurisdiction, from those states who were unwilling or unable to assume the burdens that assumption would entail, from those members of Congress who wanted to halt the drain on federal financial resources caused by retaining federal jurisdiction, and from others who recognized that federal thrift was not an acceptable excuse for abandoning the federal government's fiduciary and quasi-fiduciary obligations to Indians. PL-280 was a compromise among the powerful contending state-federal forces, in which concern for the Indians, even experimentally, was not evident. In addition to the interest in money spent or saved, the primary motivation for PL-280 was the enforcement of criminal law on the reservations. The strongest single thread in the legislative history was the intent to cure "[t]he complete breakdown of law and order on many of the Indian reservations," as Wesley D'Ewart, House Indian Affairs Subcommittee member, described the situation.[4]

Six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin), known as the "mandatory" states, were willing to assume complete civil and criminal jurisdiction, and none of them had internal impediments to assumption. PL-280 gave consent to transfer immediately full jurisdiction to those states, with a few stated exceptions for specifically designated well-governed reservations.[5] The remaining states, known as "option states," were given the limited choice "as provided in the Act" to

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[4] *Id.* at 16.

[5] Other exceptions, not pertinent here, related to trust lands and some federal treaty, contractual and statutory obligations. PL-280 § 2(b).

assume jurisdiction of "criminal offenses or civil causes, or with respect to both."[6]

The majority opinion's conclusion that Congress authorized the option states to assume patchwork jurisdiction within a single reservation is flatly contrary to its clearly evinced intent to cure the breakdown of criminal law enforcement on reservations that were not internally well governed. The most striking departure from congressional intent is the majority's conclusion that PL-280 authorized Washington's partial geographic assumption within a reservation, commonly known as "checkerboarding." The Supreme Court has noted the deleterious effects of checkerboarding upon law enforcement in an analogous situation:

> ". . . [W]here . . . the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid." (*Seymour v. Superintendent* (1962) 368 U.S. 351, 358.)

In striking down South Dakota's 1961 statute assuming jurisdiction over highways on the reservations, the South Dakota Supreme Court cited the law enforcement quagmire created by partial geographic jurisdiction as one of the reasons why such partial assumption was inconsistent with the policy of PL-280.

[6]The option states divide into two groups, those states with constitutional disclaimers of jurisdiction over Indians, and all other states. Section 6 of PL-280 permits disclaimer states to amend their constitutions to allow jurisdiction. Section 6 has been read as an alternative to section 7 which originally applied to "any other States." I interpret section 7 as applying to all states other than the mandatory states; *i.e.*, it is the general provision allowing assumption, and section 6 applies only if it is necessary to remove state constitutional impediments. The 1968 amendments, wherein section 6 was left intact as 25 U.S.C. § 1324 while section 7—now 25 U.S.C. §§ 1321, 1322—was changed to read "any State," reinforces this view.

(*In re Hankin's Petition* (S.D. Sup. Ct. 1964) 125 N.W.2d 839).[7]

Congress did not need to run experiments to decide that checkerboarding was antithetical to effective law enforcement. Moreover, when it wanted to permit some partial assumption in circumstances that did not affect criminal law enforcement, it left no doubt about its intentions. Section 2(a) of PL-280, *as amended* by Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545, 18 U.S.C. § 1162(a), exempted three named reservations. Section 2(b) provided a very narrow exception to free Indian trust property from "alienation, encumbrance, or taxation."[8] The mandatory states were to take jurisdiction in "[a]ll Indian country within the State," other than specified reservations; there is nothing to indicate the optional states were to take less. On the other hand, the 1968 amendments permit states to assume jurisdiction in the "particular Indian country or part thereof" to which the Indians consent. If Congress wished to accomplish a similar goal under PL-280, it would not have been so coy about it.

The Yakimas' reservation is a checkerboard of fee owned and non-fee owned land. The effect of Washington's partial territorial assumption is to combine on the same reservation a Wash-

[7]"It seems to us that this legislation does not tend to accomplish or promote the congressional purposes of Public Law 280. To the contrary, it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction where the Federal and Tribal courts already operate, each with limited subject matter jurisdiction. Moreover, it makes inescapable the checkerboard jurisdiction condemned in Seymour v. Superintendent, 368 U.S. 351 . . . ." (In re Hankin's Petition (S.D. Sup. Ct. 1964) 125 N.W.2d 839, 842-43.)

[8]18 U.S.C. § 1162:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

ington law enforcement pattern that varies from plot to plot depending upon the state of title to the particular parcel of land. One of the major grievances of the Yakimas is that they have seriously inadequate police protection. The Yakima Reservation occupies 46.4 percent of the land encompassed by Yakima County. Reservation Yakimas constitute almost half of the rural population of the County; 80 percent of the Yakimas live in the rural lower valley of the County. No sheriff's office exists on the reservation. Of the 29 deputy sheriffs assigned to work in the field for the County, only 2 were assigned to the reservation. The Yakima County Sheriff said that the state cannot do a good job with juveniles when it has no jurisdiction over parents and that fragmented jurisdiction hampered police work in other law enforcement areas as well.

The Yakimas have requested retrocession of state jurisdiction to enable them to return fully to federal jurisdiction with the hope of federal assistance in securing outside help and in aiding them to work out their problems within the tribal structure. The State of Washington either does not have, or declines to use resources to improve the situation, but has so far been unwilling or unable to relinquish jurisdiction. This lawsuit is a by-product of the stalemate.

The Yakimas have no effective law enforcement on their reservation.[9] Washington acknowledges that reality.[10] So does the majority of this court. The majority justifies its conclusion that the Yakimas must be made to bear those ills they have because this court refuses to fly to others that we know not of. "More critically," it says, "reversal of *Quinault II* at this late stage [10 years], along with a new interpretation of PL-280, could

[9]A default in state enforcement has created a situation that the tribal police are powerless to control because they lack jurisdiction.

"Tribal police officers were outspoken about the quality of law enforcement. Their greatest complaints concerned juvenile problems. One officer reported, 'The juvenile situation is sad. There is one juvenile officer who covers three or four counties. He seldom comes to the reservation and when he does he just scolds the kids and lets them off. The kids laugh in his face and then they laugh in my face because they know we cannot do a thing with them. . . .' Others made the same complaint and lamented that there was no action taken by the local authorities on juvenile problems. 'Sheriff's Officers release kids without holding them or doing anything. When we call them they come too late if they even bother to show up. We are getting a real hard time from kids who know we have no jurisdiction over them. Half of the time we don't let on that we have no authority over them because they would run wild.'

"Other officers reported, 'State and County authorities do not enforce the laws. The problem has become worse since the state took over. The kids know we have no authority and make it hard for us. State officials will not even go onto deeded property where Indian families live, even though they have authority to do so. The tribal police have to go there when the situation seems desperate . . . .'" ("The Impact of Public Law 280 upon the Administration of Criminal Justice on Indian Reservations," in 1 National American Indian Court Judges Ass'n., Justice and the American Indian 9 (1974) (survey of Washington Indians) [Hereinafter cited as "Indian Court Judges Survey"].)

[10]"Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses committed on reservations . . . ." (*Id.* at 7, *quoting* State of Washington, Comprehensive Plan for Law Enforcement and the Administration of Justice, January 1—December 31, 1973, at 109.)

lead to unfortunate law enforcement problems for thousands of native Americans."[11] The majority opinion's statement that reversal of *Quinault II* would adversely affect 158,000 Indians is factually incorrect. In the first place, *Quinault II* itself has adversely affected the Yakimas, and overturning the decision will alleviate their distress. In the second, invalidating Washington's truly unique checkerboarding would affect no more than about 10,000 reservation Indians in Washington.[12] The remaining

[11]Majority opinion, *supra*, at p.3.

[12]TABLE I

Washington Indian Reservations

Total Population	19,362
Number subject to partial geographic and partial subject matter jurisdiction under '63 act (checkerboarding)	9,697
Number subject only to partial subject matter jurisdiction under '63 act	985
Number consenting to full jurisdiction under '63 act	5,758
Number consentng to full jurisdiction under '57 act	2,647
[495 subject to criminal jurisdiction only]	
Number over which jurisdiction retroceded in accordance with PL 90-284	275

Source: Indian Court Judges Survey, *supra* note 9, at App.C.
The reservations subject to checkerboard jurisdiction include Hoh (60), Kalispel (167), Lower Elwha (250), Lummi (1,225), Nooksack (370), Puyallup (450), Quinault (1,200), and Yakima (5,975) reservations.

Washington Indians would be unaffected because they live on reservations where all the land is held in tribal trust,[13] have consented to full jurisdiction under the 1963 statute,[14] have consented to full jurisdiction under the 1957 statute,[15] or are covered by federal jurisdiction after a retrocession.[16] Almost two-thirds of the affected Indians reside on the Yakima reservation and are the parties in interest in this suit.

Invalidating the Washington assumption statute under PL-280 for impermissible geographical checkerboarding would break the stalemate. Washington would be relieved of a law enforcement burden she is unwilling or unable to carry. The Yakimas would be free to neogtiate with the federal government and with the State of Washington under PL-90-284.[17] In the interim, the Yakimas' own tribal officers would have authority to deal with offenses and offenders whom they now can do no more than passively observe. This interpretation would not jeopardize jurisdiction that Washington assumed under its 1957 statute, nor is there any reason to believe that jurisdiction thereafter assumed by agreement pursuant to the 1963 law would be adversely affected by invalidation under PL-280.

II

The majority opinion also errs in upholding the Washington statute against attack based upon partial subject matter assumption. Because I would strike the statute down for impermissible partial territorial assumption, I would not need to reach the partial subject matter issue. I reach the question only because the majority does so.

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[13]This group includes the Makah (805), Port Gamble (165), and Shoalwater (15) reservations. *Id.*

[14]This group includes the Colville (5,350) and Muckelshoot (408) reservations. *Id.*

[15]This group is composed of the Chehalis (116), Nisqually (85), Quileute (450), Skokomish (386), Squaxin (165), Swinomish (495) (criminal jurisdiction only), and Tulalip (950) reservations. *Id.*

[16]Port Madison reservation.

[17]25 U.S.C. §§ 1321-23.

This result would also be more consistent with the present federal policy of Indian self-determination. See Comment, "The Indian Battle for Self-Determination," 58 Calif. L.Rev. 445, 461-63 (1970). It is an example of wooden legalism to misinterpret PL-280 so as to conflict with present policy. Fortunately, it has long been the usual experience that "[t]he federal judiciary . . . has attempted to mitigate the impact of fluctuating congressional policies." *Id.* at 446.

Congress required the mandatory states to assume complete subject matter jurisdiction. It had very little reason to require less of the option states, when and if they accepted the invitation to assume jurisdiction. But Congress had a very good reason for not permitting any state to choose the subject matter jurisdiction that it would assume. Congress knew that the states wanted the sweet but not the bitter jurisdiction over Indians.[18] Authorization to states to make their own selections of jurisdiction could lead to the very result that Congress wanted to avoid, that is, letting the states pick only that subject matter jurisdiction from which they could derive benefit and leaving all the onerous matters to the Federal Government. Furthermore, a driving force for passing PL-280 was bringing adequate criminal law enforcement to reservations. Congress knew that in absence of full assumption by a single government, criminal law was a jungle of conflicting jurisdictional problems and fragmented administration that defied effective enforcement.[19]

It is unnecessary, however, to decide whether, before 1968, Congress gave any leeway to option states to assume jurisdiction selectively. It would be enough to decide a much narrower question: Did Congress authorize Washington to assume some but not all of the jurisdiction relating to criminal offenses, adult and juvenile? The simple answer to that question is "no."

Although there is arguable textual support in section 7 for dividing civil and criminal subject matter jurisdiction ("criminal offenses or civil causes of action, or with respect to both"), the same language and that of section 6 ("civil and criminal jurisdiction") supplies strong textual support for the inference that

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[18]*See* Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 U.C.L.A. L.Rev. 535, 555 (1975).

This article has meticulously collected and analyzed the legislative history of PL-280. The majority, *supra*, at note 4, cites this article for the proposition that the legislative history does not definitely indicate whether partial subject matter jurisdiction was within the intent of PL-280. However, the majority then goes on to ignore the subsequent analysis in the article which concluded that such jurisdiction is invalid.

[19]It still is. E.g., 18 U.S.C. §§ 1321, 1152, 1153, 1162(c). *See also,* United States v. Cleveland (9th Cir. 1974) 503 F.2d 1067; In re Carmen's Petition (N.D. Cal. 1958) 165 F. Supp. 942, *aff'd sub. nom.* Dickson v. Carmen (9th Cir. 1959) 270 F.2d 809; Davis, "Criminal Jurisdiction over Indian Country in Arizona," 1 Ariz. L.Rev. 62 (1959); Goldberg, *supra* note 18, at 541.

Congress had no intention of permitting a state to assume pieces of the whole criminal or civil packages.

The 1968 amendments, in contrast, unmistakably permit piecemeal assumption of jurisdiction. (*See, e.g.*, 25 U.S.C. § 1321(a): "jurisdiction over any or all [criminal] offenses . . . .") Representative Aspinall on the floor of the House stated that this aspect of the 1968 bill was a change in the law. (114 Cong. Rec. 9615 (1968).) Although this statement is not weighty by itself, it is an additional indication that this reading of PL-280 is correct.[20]

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[20]*See also,* Statement of Arthur Lazarus, Jr. (an attorney representing six tribes) in Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs, 90th Cong., 2d Sess., 116 (1968) ("One of the major objections to Public Law 280 is its 'all or nothing' approach, requiring States to assume all jurisdiction on Indian reservations if any jurisdiction is desired."); Letter from Warren Christopher, Dep. Att'y Gen., to Rep. Wayne N. Aspinall, Mar. 29, 1968, *id.* at 28. *But see,* Letter from Harry R. Anderson, Ass't Sec. of the Interior, to Rep. Wayne N. Aspinall, *id.* at 25.

Evaluating legislative history to determine congressional intent can sometimes be an exercise in nuance. Although the Court has indicated what material is relevant to the determination, little guidance concerning weighting has been attempted. *E.g.*, Galvan v. Press (1954) 347 U.S. 522 (memorandum inserted in Congressional Record by sponsor); Schwegmann Bros. v. Calvert Corp. (1951) 341 U.S. 384, 394-95 (statement by sponsor during presentation on floor of Senate for vote); United States v. C.I.O. (1948) 335 U.S. 106, 113-21 (congressional discussion); Helvering v. Griffiths (1943) 318 U.S. 371 (legal opinions relied on by committee and sponsors); Harrison v. Northern Trust Co. (1943) 317 U.S. 476 (reports of congressional committees). Here the inquiry is even more obscured because we must look to the history of subsequent legislation to divine the intent of the earlier enactment. Mattz v. Arnett (1973) 412 U.S. 481, 505 n. 25 ("Although subsequent legislation usually is not entitled to much weight in construing earlier statutes, . . . it is not always without significance. See *Seymour v. Superintendent,* 368 U.S., at 356-57.").

Nevertheless, the intent of the 1968 amendments is relevant and reasonably certain enough to add support to the view that partial subject matter jurisdiction is inconsistent with the intent of PL-280. Representative Aspinall was Chairman of the House Interior and Insular Affairs Committee which reported out the bill. His remarks were the only representation as to what the bill was intended to accomplish. The sponsors (Reps. Cunningham & Denney and Sen. Ervin) made no remarks. When weighed against a conflicting view

Invalidation on this ground would also have an impact short of the majority's fears. The only states, in addition to Washington, asserting partial subject matter jurisdiction are Arizona, Idaho, and New Mexico.[21] Arizona has extended jurisdiction only over air and water pollution matters.[22] Frustration of this assumption will cause minimal law enforcement or civil problems for either Arizona or Indians on reservations in that state.

Idaho's assumption is similar to Washington's in the subjects covered, but contains one crucial difference.[23] The Idaho jurisdiction is shared with tribal courts as it is concurrent with them.[24] It is unclear that invalidation would have any adverse impact because tribal court structures are performing the task now. Finally, the legality of New Mexico's assumption will remain unaffected as it has attempted to assert jurisdiction on statutory bases other than PL-280.[25] Invalidation does not prevent the states and tribes from negotiating a structure which will operate to the benefit of both. Although I do not know whether Indians in Idaho are experiencing similar problems to those of the Yakimas, invalidation of partial subject matter assumptions would not throw the administration of justice to reservation residents into chaos.

The majority opinion rests on unsound law, and on fears, not facts. The result is a perpetuation of ills forced upon the Yakimas that benefits no one.

I would reverse, invalidating the Washington statute, and set the Yakimas and Washington free from statutory bonds that chafe them both.

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expressed in the opinion of the Assistant Secretary of the Interior, an opinion contradicted by counsel representing some tribes and implicitly contradicted by the Deputy Attorney General, the pronouncement on the floor of the House should control. *Cf.* Schwegmann Bros. v. Calvert Corp., *supra,* at 394-95 (expression of fear in minority report of Senate Committee not authoritative guide to construction of legislation).

[21]Indian Court Judges Survey, *supra* note 9, at 25-26.

[22]*Id.* at 91.

[23]*Id.* at 95.

[24]*Id.*

[25]*Id.* at 91-92.

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APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,	)	
Plaintiffs,	)	CIVIL NO. 2732
vs.	)	
STATE OF WASHINGTON COUNTY OF YAKIMA, DANIEL J. EVANS AS GOVERNOR OF THE STATE OF WASHINGTON AND INDIVIDUALLY, SLADE GORTON AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND INDIVIDUALLY, LEW CONRAD, CLIFF ONSGARD AND AGNUS McDONALD AS COUNTY COMMISSIONERS AND INDIVIDUALLY,	)	OPINION
Defendants.	)	

I. NATURE OF THE PROCEEDINGS

The pretrial order in this case states that issues of law one through seven, were to be determined by the Court as a matter of law on the record. An Opinion and an Order granting defendants' motions for partial summary judgment on these issues were filed December 1, 1972 and March 5, 1973, respectively. That opinion was entered subject to revision, pursuant to F.R.C.P. 54(b). The remaining issues were presented March 20, 1973 in Yakima. The prior opinion granting partial summary judgment is hereby incorporated in and made a part of this opinion.

The question for decision at this second stage of the case is whether the provisions of RCW 37.12.010[1] as applied to the Yakima Indian Reservation violate Constitutional standards of due process or equal prote tion. The Court is to decide whether plaintiffs' allegations that general governmental services, and in particular law enforcement protection, rendered plaintiff and its members are of such disparity with that given non-Indians or to non-Indian land as to constitute a denial of equal protection.

II. JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§1343 and 1362, and 42 U.S.C. §§1983 and 1985.

III. EVIDENCE SUBMITTED

Plaintiff presented its case through the testimony of adverse witnesses. The three County Commissioners of Yakima County, the Sheriff, the Director of Juvenile Court Services, the County Prosecutor and two Deputy Sheriffs who patrolled the Reservation were called. Testimony was also introduced through an assistant National Forest Manager who testified as a map expert, and Indian Tribal Judge from the Southwestern part of the United States who testified about a study of the effects of P. L. 83-280 (set out in prior opinion) that he is conducting; and an attorney for the Warm Springs Tribe of Oregon who testified as an expert in Indian law. Witnesses from the plaintiff Tribe included the Chairman of the Tribal Council, the Chairman of the Tribal Law and Order Committee, a Yakima Tribal Court Judge, and a third member of the Tribal Council who was former associate judge and former tribal policeman.

The defendants' witnesses were the Captain of the Indian Police force, the Chief Deputy Sheriff, a Deputy Sheriff from the Sunnyside substation, the Indian Probation Counselor for Yakima County, and the Yakima County Sheriff. Each side also presented voluminous exhibits of studies, surveys and statistical data.

The laws of the State of Washington permit county governments to generate less revenue than city governments. The County Commissioners and the Sheriff and his Chief Deputy and others testified as to the general need for more money to provide more adequate services throughout the county. Yakima County levied a per capita property tax of $122 in 1972. It was 37th of the 39 counties in Washington[2] (Exhibit 48). The county's area is 77.9% public[3] land which is not taxable. (Exhibit 47).

There has been a steady increase in the Sheriff's budget in recent years. In 1970 the budget was $501,374.53 (Exhibit 13, p. 21). In 1972 it was approximately $528,528.00, plus $209,216.00 for operation of the jail. (Exhibits 22 and 103). The testimony of Commissioner Conrad was that the Sheriff's budget for 1973 was approximately $719,000.00 and about $243,000.00 was budgeted for operation of the jail. The law enforcement departments of the county have expanded at a greater rate than other county departments. Law enforcement is funded through the County Current Expense Fund. Property taxes are a primary source of revenue for the county.

The Yakima County Sheriff's office employed 69 people at the date of trial. Some personnel are Indian to some blood degree, or married to Indians. Twenty-one were uniformed line deputies working in the field. These men were assigned as follows: To the Mountain or Forest Area--2 men; to the Upper Valley around the City of Yakima--17 men; to the Lower Valley embracing the Yakima Indian Reservation--7 men; to traffic patrol throughout the valley--2 men; to airport security--1 man. In addition, a three-man detective team and a juvenile officer work throughout the county.

Many factors are considered in determining where sheriff's deputies will be assigned. The area denominated as the Upper Valley encompasses 1,862.31 square miles, or about 43.45% of the total area within the county. (Exhibits 32, 33). The population of the Upper Valley is 55,231 in urban areas and 39,322 in rural areas. In the Lower Valley, the urban population is 18,950 and rural population is 31,477.[4]

The County court house is located in the Upper Valley. Sheriff's deputies spend many man hours testifying, serving process, and providing courtroom and prisoner security. Personnel primarily assigned to the Lower Valley seldom work the court house detail. The most experienced sheriff's deputies work in the Lower Valley. To facilitate communications between the residents of the Lower Valley and the Sheriff's Department a toll free after-business-hours direct line to Yakima was being installed at the time of trial.

As noted in the Opinion and Order granting partial summary judgment, state and county jurisidiction under RCW 37.12.010 does not extend to Yakima Tribal or allotted lands except for eight enumerated areas. Further, over half the reservation is closed by the tribe to protect the forest area from which the bulk of the Tribe's income is generated. The Chairman of the Tribe's Law and Order Committee testified that the county sheriff's deputies would need a special business permit to patrol this closed area.

To assure that law enforcement officers have jurisdiction, regardless of whether an offense is committed on Indian or non-Indian land, the agencies involved have been cross-deputized by the Yakima County Sheriff. In turn, the Indian authorities have deputized 20 Yakima Sheriff's office personnel. The Bureau of Indian Affairs has also deputized Yakima Sheriff's deputies.

The Tribal officers testifed that their people complain to them of lack of responsiveness by state and county officers, and that there was a general feeling among their members that law enforcement services were inadequate. These witnesses related incidents of cases brought to the prosecutor's attention and no prosecution resulted. They also testified that it cost $228,000.00 in 1972 to provide

the reservation with a tribal police force of 18 men. They also said that Indians were offended at what was felt to be disparaging racial slurs on the police radio. For instance, police radio report of a "drunken Indian" was objectionable.

Exhibit 43 substantiates the plaintiff's claim that the jails in the Cities of Toppenish and Wapato are inadequate. Neither the exhibit nor the testimony establish, however, that these jails are only or primarily used to detain Indians and that different facilities are used for non-Indians or that these jails are not typical of a condition of inadequate detention facilities prevalent throughout the State of Washington. (Exhibit 43, p. 59).

Other disadvantages of State jurisdiction were related. The State adoption standards are different than those presently felt relevant to the local Indian culture. Consequently, Indian children usually are adopted by non-Indian families. Besides experiencing a period of cultural shock, an Indian child not adopted by an Indian family cannot therefore be an enrolled member of the Tribe. As a result the child loses hunting and fishing rights, support while seeking higher education (if qualified for such pursuit), and entitlement to share in the annual per capita distribution. In cases of divorce, unlike the Tribe, the State is without jurisdiction to impress trust assets for the support of the children.

All parties agreed that the State's assumption of jurisdiction over Indian juveniles (one of the eight enumerated areas) resulted in a less than perfect[5] system of handling juvenile dependency and delinquency because the State has no jurisdiction over Indian adult parents on Indian land. Of course, the Tribe's petition for State assumption of total civil and criminal jurisdiction would eliminate this problem. See: Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656-658 (9 Cir. 1966).

IV. GENERAL PRINCIPLES OF LAW APPLICABLE

It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens or similar geographic location. Nor was there any evidence of any conspiracy to discriminate. Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286 (5 Cir. 1971), aff'd on rehearing, 461 F.2d 1171 (5 Cir. 1972), is not in point.

Plaintiff is representative of a class of people historically saddled with disabilities. They have been subjected to unequal treatment and traditionally have been politically powerless to act.[6] This condition has led to such judicial utterances as:

"It must be remembered that the fundamental consideration is the protection of a dependent people." United States v. Pelican, 232 U.S. 442, 450 (1914); and,

". . . legislation of Congress is to be construed in the interest of the Indian, . . ." United States v. Celestine, 215 U.S. 278, 290 (1909).

Recently, in McClanahan v. State Tax Commission of Arizona, ___ U.S. ___ (1973), 41 U.S.L.W. 4457, 4460 (March 27, 1973), the court stated that historical incidents of non-Indians taking advantage of Indians has resulted in adoption of the general rule that "Doubtful expressions [in Treaties] are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Carpenter v. Shaw, 280 U.S. 363, 367 (1930)."

The purpose of P.L. 83-280 is to "permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs." Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371, 374 (S.D. Cal. 1971). See S.Rep. No. 669, 83d Cong., 1st Sess. (1953), 2 U.S. Code, Cong. & Ad. News, p. 2409 (1953).

The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members.

The fundamental constitutional right of equal protection is not shown to have been violated. The right of plaintiff Tribe to be a dependent people, protected by the federal government[1/] is not a fundamental right protected by the Constitution. See: The Mescalero Apache Tribe v. Franklin Jones, Commissioner, ___ U.S. ___, 41 U.S.L.W. 4451 (March 27, 1973); McClanahan v. State Tax Commission of Arizona, ___ U.S. ___, 41 U.S.L.W. 4457 (March 27, 1973); Williams v. Lee, 358 U.S. 217, 219-220 (1959); Marchie Tiger v. Western Investment Co., 221 U.S. 286, 314-316 (1911); Matter of Heff, 197 U.S. 488 (1905). In San Antonio Independent School District et al., v. Rodriguez et al., ___ U.S. ___, 41 U.S.L.W. 4407 (March 21, 1973), the Supreme Court dealt with the application of the equal protection clause in school financing. The Texas statutory school financing plan in operation favored certain districts with high assessed valuation of property

over those with larger enrollment and small per student assessed valuation. One example cited shows one district contributing $26 per pupil while the more affluent district contributed $333 per pupil.

The opinion states the system does not operate to the peculiar disadvantage of any suspect class. ___ U.S. at ___, 41 U.S.L.W. at 4415:

"In sum, to the extent that the Texas system of school finance results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory." ___ U.S. at ___; 41 U.S.L.W. at 4423.

In the Rodriguez case as here, the system impinges on no substantive constitutional rights or liberties. ___ U.S. at ___; 41 U.S.L.W. at 4426.

V. CONCLUSION

There is little evidence that governmental service provided non-Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the State or County or their officers. It has not been shown that the State and County system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment.

The action will be dismissed. Defendants may prepare judgment and present it.

DONE BY THE COURT THIS 28th day of June, 1973.

Charles L. Powell
United States District Judge

FOOTNOTES

1/ RCW 37.12.010:
"Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."

2/ The Tribe alleged at trial that federal revenue sharing funds were improperly used by the Yakima County Commissioners to reduce property taxes rather than remedy or improve inadequate governmental services to rural residents. Whether the county properly used and accounted for these funds is not before the court in this case under the issues of fact and law and contentions raised in the pretrial order. The end result of such use was not shown to favor the non-Indian as compared to the Indian population or disadvantage one more than the other.

3/ Besides the Indian Reservation, the county has within it an Army Firing Range, and part of a National Forest.

4/ The Indian population in the county is 3,882, of which 3,074 live in the Lower Valley on or near the reservation. The total enrolled membership of the Confederated Bands and Tribes of the Yakima Indian Nation is 6,040.

5/ Part of the imperfection may be attributed to a lack of cooperation from the Tribe. The Juvenile Court Services Director testified that he could use more personnel. He has 15 salaried officers and 100 volunteers throughout the county other than the reservation. So far only one Indian volunteer has responded to his several requests for assistance. There are 15 receiving homes (short term foster homes) in the Lower Valley and one in the Upper Valley. None are operated by the Indians. Since 1971 this department's budget has increased from $286,000 to $424,000 and staff from 5 to 15 probation officers. Of 167 juveniles on probation at the time of trial only 23, or 13.7% were Indian children.

6/ For instance, the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §461 et seq., was intended "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). See also, S. Rep. No.721 90th Cong. 2d Sess. (1968), 2 U.S. Code, Cong. & Ad. News, p. 1837, Additional Views of Mr. Ervin, 1854, 1863-1867.

7/ Contrary to plaintiff's contention [Plaintiff's Post Trial Memorandum, p. 3, lines 23-28] the federal government's power over Indian Tribes is not solely derived from the federal government's duty to protect the tribes. United States v. Kagama, 118 U.S. 375 (1886). In McClanahan v. State Tax Commission of Arizona, ___ U.S. ___; 41 U.S.L.W. 4457, 4459 n.7 (U.S. March 27, 1973), the court stated:

> "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U.S. Const. Art. I, §8, Cl.3; Art. II, 32, Cl.2. See also Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); Perrin v. United States,232 U.S. 478, 482 (1914); Federal Indian Law 3."

APPENDIX E

STATE STATUTE

Chapter 37.12
INDIANS AND INDIAN LANDS——JURISDICTION

Sections

37.12.010 Assumption of criminal and civil jurisdiction by state.
37.12.021 Assumption of criminal and civil jurisdiction by state——Resolution of request——Proclamation by governor, 1963 act.
37.12.030 Effective date for assumption of jurisdiction——Criminal causes.
37.12.040 Effective date for assumption of jurisdiction——Civil causes.
37.12.050 State's jurisdiction limited by federal law.
37.12.060 Chapter limited in application.
37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes.

Alienation of land by Indians: Chapter 64.20 RCW.

Annexation of federal areas by first class city: RCW 35.13.185.

Compact with the United States: State Constitution Art. 26 § 2.

Daylight saving time——Prohibition not applicable to federal areas: RCW 1.20.050.

Qualifications of voters: State Constitution Art. 6 § 1 (Amendment 63).

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted. [1963 c 36 § 1; 1957 c 240 § 1.]

*Reviser's note: "chapter 36, Laws of 1963" which became effective on March 13, 1963, amended RCW 37.12.010, 37.12.030, 37.12.040 and 37.12.060, repealed RCW 37.12.020, and enacted a new section codified herein as RCW 37.12.021.

37.12.021 Assumption of criminal and civil jurisdiction by state——Resolution of request——Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060. [1963 c 36 § 5.]

37.12.030 Effective date for assumption of jurisdiction——Criminal causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state. [1963 c 36 § 2; 1957 c 240 § 3.]

37.12.040 Effective date for assumption of jurisdiction——Civil causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state. [1963 c 36 § 3; 1957 c 240 § 4.]

37.12.050 State's jurisdiction limited by federal law. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session). [1957 c 240 § 5.]

37.12.060 Chapter limited in application. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe,

band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof. [1963 c 36 § 4; 1957 c 240 § 6.]

37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section. [1957 c 240 § 7.]

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1225

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION, *Appellant*,

v.

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON, and CHARLES RICH as County Commissioners and individually, *Appellees.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that the State of Washington, County of Yakima, Dixy Lee Ray as Governor of the State of Washington, Slade Gorton as Attorney General of the State of Washington and Les Conrad, Graham Tollefson and Charles Rich as County Commissioners, the appellees above-named, hereby appeal to the Supreme Court of the United States from the judgment in this case evidenced by the opinion of the Court of Appeals for the Ninth

Circuit dated and entered April 29, 1977, declaring RCW 37.12.010, § 1, Chapter 36, Laws of 1963, unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: July 27, 1977.

SLADE GORTON
Attorney General

MALACHY R. MURPHY
Deputy Attorney General
Attorneys for Appellees State of Washington, Dixy Lee Ray and Slade Gorton

JEFFREY C. SULLIVAN
Prosecuting Attorney
Attorney for Appellees Yakima County and Les Conrad, Graham Tollefson and Charles Rich

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 1977, three copies of the Jurisdictional Statement were mailed, postage paid, to James B. Hovis, Attorney at Law, 316 North Third Street, Yakima, Washington, 98907, counsel for appellant. I further certify that all parties required to be served have been served.

MALACHY R. MURPHY
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

Supreme Court, U. S.
FILED
APR 13 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON, COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOCKETED SEPTEMBER 12, 1977
PROBABLE JURISDICTION NOTED
FEBRUARY 27, 1978

APPENDIX

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1977

No. 77–388

STATE OF WASHINGTON, COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOCKETED SEPTEMBER 12, 1977
PROBABLE JURISDICTION NOTED
FEBRUARY 27, 1978

APPENDIX

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The decision in question has been printed as Appendix A to the Jurisdictional Statement and is not reprinted herein. Also printed in the Jurisdictional Statement as Appendix C is the *en banc* opinion of the Ninth Circuit Court of Appeals which preceded the panel's decision being appealed from. That *en banc* opinion is likewise not reprinted herein.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

NO. 2732

OPINION ON MOTIONS FOR SUMMARY JUDGMENT

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,

Plaintiffs

VS.

STATE OF WASHINGTON, COUNTY OF YAKIMA, et al.,

Defendants

I.
NATURE OF THE PROCEEDINGS

This action was brought by the plaintiff, an Indian Nation established by a Treaty with the United States of America, with a governing body duly recognized by the Secretary of the Interior. The action is to declare under 28 U.S.C. 2201, the rights and legal relationships of the plaintiff and its members with regard to the assumption and exercise of jurisdiction by the State of Washington on the Yakima Indian Reservation. The defendants have moved for summary judgment. A pretrial order has been entered and this opinion is based upon the agreed facts therein stated.

II.
STATEMENT OF THE CASE

The area in question, which is the Yakima Indian Reservation, contains approximately 1,387,505 acres within its exterior boundaries. All of that area, except approximately 270,895 acres, is held in trust or in restricted status for the benefit of the plaintiff and its members.

The State of Washington assumed jurisdiction over the plaintiff and its members by enactment of Chapter 36, Laws of 1963, which amended Chapter 240, Laws of 1957. It is now codified as RCW Chapter 37.12.

RCW 37.12.010[1] was passed pursuant to the provisions of Public Law 83–280 (67 Stat. 588), of the Laws of the United States. The plaintiff claims that RCW 37.12-.010 is void or, in the alternative, that jurisdiction so assumed can be exercised by the State of Washington only concurrently with the plaintiff Tribes and the Federal Government.

[1]"RCW 37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and

The plaintiff's contentions are that the State of Washington violated the provisions of Pub. L. No. 83–280 and of its own constitution and enabling Act (25 Stat. 676) by failing to amend Article XXVI of the State Constitution prior to assuming jurisdiction over the plaintiff and its members. The plaintiff further contends that the State of Washington violated the provisions of Pub. L. No. 83–280 by assuming less than full jurisdiction over the plaintiff and its members when it enacted RCW 37.12.010.

Plaintiff further contends that by assuming jurisdiction over plaintiff and its members without their consent the State violated the Tribal sovereignty guaranteed to plaintiff and denied the plaintiff and its members due process of law, and in assuming less than full and complete jurisdiction the State denied the plaintiff and its members equal protection of the laws. Plaintiff further contends that RCW 37.12.010 violates the standards of definiteness required by the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that the State of Washington and Yakima County have failed to provide the plaintiff and its members the same protection to persons and property as is provided elsewhere in the state, thus denying the plaintiff and its members equal protection of the laws guaranteed to them by the Fourteenth Amendment.

1 (Continued)

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if Chapter 36, Laws of 1963 had not been enacted."

III.
ISSUES PRESENTED

The issues presented, which are set forth as Issues of Law in the Pretrial Order, pages 42 and 43, and which are for determination on the motion for summary judgment are as follows:

1. Was it necessary for the State of Washington in assuming jurisdiction over Indian Reservations to amend Article XXVI of the State Constitution?

2. Can the State of Washington under the provisions of Pub. L. No. 83–280 assume less than full jurisdiction?

3. Is state jurisdiction under RCW 37.12 concurrent or exclusive?

4. Was the plaintiff's consent to State assumption of jurisdiction necessary?

5. Does the plaintiff Tribe have standing to raise the issue of vagueness of RCW 37.12.010 and the claimed denial of due process to its members?

6. Do the provisions of RCW 37.12.010 meet constitutional standards for definiteness?

7. Do the provisions of RCW 37.12 as enacted meet the constitutional and legal standards of due process and equal protection of person and property?

1. Necessity to Amend Article XXVI of the State Constitution.

The plaintiff contends that the State of Washington was without authority to pass RCW 37.12 because the enabling act, Article XXVI of the State Constitution of the State of Washington, provides that the people of the

State of Washington may not exercise jurisdiction over any lands lying within the State and held or owned by Indians or Indian Tribes. This question has already been determined against the plaintiff's position by several holdings in this State and Circuit. See *State v. Paul*, 53 Wn.2d 789, 794, 337 P.2d 33 (1960); *Makah Indian Tribe v. State*, 76 Wn.2d 485, 456 P.2d 590 (1969); and *The Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, (9 Cir. 1966), *cert. den.* 387 U.S. 907; 18 L.Ed.2d 626, 87 Sup. Ct. 1684.

The State Supreme Court interpretation of the requirements of the State Constitution are binding on this Court.[2]

2. Can the State under the provisions of Public Law 83-280 assume less than full jurisdiction?

In reviewing the authorities it is my opinion that this issue has also been determined adversely to the plaintiff's contention. In *Quinault Indian Tribe of Indians v. Gallagher*, supra, the court said:

> "We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a Tribal resolution and gubernatorial proclamation. . . .
>
> In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280. If the Quinault Tribe of Indians feels

[2]See *Quinault Tribe of Indians v. Gallagher*, 368 F.2d at 656 and 657. (9 Cir. 1966).

aggrieved because state jurisdiction is not presently being exerted to the full extent possible under chapter 36, all it has to do is provide the Governor with a tribal resolution of the kind called for in section 5 of that act (RCW 37.12.021). A Governor's proclamation would necessarily follow, and a full exertion of state jurisdiction would be achieved." (368 F.2d at 657–658). See *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 430–431, n.6 and rebutting note in dissent.

3. Is the state jurisdiction under RCW 37.12.010 concurrent or exclusive?

It is my opinion that it has been determined that the state has exclusive jurisdiction under RCW 37.12.

Public Law 83–280 grants jurisdiction over certain Indian Tribes to the states named in that act and provided in Sections 6 and 7 that other states may in addition qualify for inclusion under the provisions of the act.[3]

In addition, under the provisions of 18 U.S.C. 1162(a) it appears that each state is entitled to exercise "jurisdiction over offenses committed by or against Indians in

[3]"Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act; Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

the areas of Indian country, . . . and the criminal laws of such state or territory shall have the same force and effect within such Indian country as they have elsewhere within the state or territory; . . . ."

Further, under 18 U.S.C. 1162(c) (as amended in 1970), "The provisions of sections 1152 and 1153 of this chapter [extending federal law of punishments to Indian Country, with certain exceptions, and the 13 major crimes act] shall not be applicable within the areas of Indian country listed in subsection (a) of this section [Indian lands over which State jurisdiction has been extended] as areas over which the several states have *exclusive* jurisdiction." (Emphasis added.)

It is my opinion that under the statute the states have exclusive jurisdiction and that there is no concurrent jurisdiction.

4. Was the plaintiff's consent to the transfer of jurisdiction necessary?

In my opinion the consent of the plaintiff was unnecessary. The enactment by Congress of Pub. L. No. 83–280, was sufficient. The *Quinault* case, 368 F.2d 648 (9 Cir. 1966) so holds. See also, *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 427 (1971).

5. and 6. Does the plaintiff have standing to raise the issue of vagueness?

Plaintiff argues that RCW 37.12.010 is unconstitutionally vague. That alone is not sufficient. 28 U.S.C. 1362

grants original jurisdiction to district courts over civil actions brought by recognized Indian Tribes if a controversy arises under the Constitution, laws, or Treaties of the United States. RCW 37.12.010 was enacted pursuant to Pub. L. No. 83–280, (codified as 28 U.S.C. 1360, before repealed, and 18 U.S.C. 1162). There is no remaining question as to the validity of the State's jurisdiction under its statutes. The Washington statutes do not define crime; they merely authorize extension of State jurisdiction and provide for enforcement of enumerated areas of state criminal and civil law.

In an action for declaratory judgment, the requirements of standing are more strict than in actions for other kinds of relief in order to insure adherence to the case or controversy standards in Article III of the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). The plaintiff has standing to question the validity of the statute as applied in an actual controversy. The plaintiff Tribe does not have standing, in the justiciable sense, to assert as an abstract proposition that RCW 37.12.010 is an impermissibly vague grant of jurisdiction. The required "controversy" with regard to this multi–faceted question is not sufficiently present in this case. The federal courts may not give advisory opinions. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); See also, Amsterdam, *The Void For Vagueness Doctrine In The Supreme Court*, 109 U.Pa. L. Rev. 67, 75–85 (1960).

7. Do the provisions of RCW 37.12 as enacted meet the constitutional and legal standards of due process and equal protection of person and property?

The question is whether the laws *applicable* under this statutory scheme are the same laws enforced throughout the rest of the state. I conclude they are and that the relevant statutory and case law of the State of Washington is necessarily incorporated under RCW 37.12. Accordingly, these provisions, as enacted, comport with due process and equal protection. The closely related question of whether they continue to do so as enforced and applied in practice is a matter still subject to proof.

The attorneys for defendants are requested to submit an order granting partial summary judgment.

DONE BY THE COURT this _ day of November, 1972.

s/Charles L. Powell

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

NO. 2732

ORDER GRANTING MOTIONS FOR PARTIAL SUMMARY JUDGMENT

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,

Plaintiffs

VS.

STATE OF WASHINGTON, COUNTY OF YAKIMA, et al.,

Defendants

This matter having come on for hearing on August 29, 1972, the defendants having moved for partial summary judgment, a Pretrial Order having been entered which sets forth issues of law and fact to be determined by the Court, and declares that Issues of Law 1 through 7 of said Pretrial Order inclusive may be determined by the Court as a matter of law on the state of the record and that all parties shall be considered to have filed motions for summary determination of those issues, the Court having heard argument of counsel and being fully advised in the premises; now therefore

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Partial Summary Judgment is denied.

2. Defendants' Motions for Partial Summary Judgment on Issues of Law 1 through 7 inclusive of the Pretrial Order are granted as follows:

A. It was not necessary for the State of Washington in assuming jurisdiction over Indian reservations to amend Article XXVI of the State Constitution.

B. That the State of Washington could under the provisions of Public Law 83–280 assume less than full jurisdiction.

C. That the jurisdiction assumed by the State of Washington is exclusive and there is no concurrent jurisdiction in either the Federal Government or the plaintiff.

D. That the plaintiffs' consent to the transfer of jurisdiction to the State is not necessary.

E. That the plaintiff does not have standing to raise the question of whether RCW 37.12.010 is unconstitutionally vague until there is a showing of controversy.

F. The provisions of RCW 37.12 as enacted meet the constitutional and legal standards of due process and equal protection of person and property. The question of whether they meet these standards as applied in practice is subject to proof and determination.

IT IS FURTHER ORDERED THAT PURSUANT TO Rule 54(b) this order as it adjudicates fewer than all of the claims shall not terminate the action as to any of the claims of the parties and is subject to revision at any time before the entry of judgment adjudicating all the claims after further trial.

DONE BY THE COURT this 5th day of March, 1973.

APPENDIX

s/Charles L. Powell

United States District Judge

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 2732

OPINION

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS.

Plaintiffs

VS.

STATE OF WASHINGTON COUNTY OF YAKIMA, DANIEL J. EVANS AS GOVERNOR OF THE STATE OF WASHINGTON AND INDIVIDUALLY, SLADE GORTON AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND INDIVIDUALLY, LES CONRAD, CLIFF ONSGARD AND ANGUS MCDONALD AS COUNTY COMMISSIONERS AND INDIVIDUALLY,

Defendants

I. NATURE OF THE PROCEEDINGS

The pretrial order in this case states that issues of law one through seven, were to be determined by the Court as a matter of law on the record. An Opinion and an Order granting defendants' motions for partial summary judgment on these issues were filed December 1, 1972 and March 5, 1973, respectively. That opinion was entered subject to revision, pursuant to F.R.C.P. 54(b). The remaining issues were presented March 20, 1973 in Yakima. The prior opinion granting partial summary

judgment is hereby incorporated in and made a part of this opinion.

The question for decision at this second stage of the case is whether the provisions of RCW 37.12.010[1] as applied to the Yakima Indian Reservation violate Constitutional standards of due process or equal protection. The Court is to decide whether plaintiffs' allegations that general governmental services, and in particular law enforcement protection, rendered plaintiff and its members are of such disparity with that given non–Indians or to non–Indian land as to constitute a denial of equal protection.

II. JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§1343 and 1362, and 42 U.S.C. §§1983 and 1985.

III. EVIDENCE SUBMITTED

Plaintiff presented its case through the testimony of adverse witnesses. The three County Commissioners of Yakima County, the Sheriff, the Director of Juvenile Court Services, the County Prosecutor and two Deputy Sheriffs who patrolled the Reservation were called. Testimony was also introduced through an assistant National Forest Manager who testified as a map expert, an Indian Tribal Judge from the Southwestern part of the United States who testified about a study of the effects of P. L. 83–280 (set out in prior opinion) that he is conducting; and an attorney for the Warm Springs Tribe of Oregon who testified as an expert in Indian law.

Witnesses from the plaintiff Tribe included the Chairman of the Tribal Council, the Chairman of the Tribal Law and Order Committee, a Yakima Tribal Court Judge, and a third member of the Tribal Council who was former associate judge and former tribal policeman.

The defendants' witnesses were the Captain of the Indian Police force, the Chief Deputy Sheriff, a Deputy Sheriff from the Sunnyside substation, the Indian Probation Counselor for Yakima County, and the Yakima County Sheriff. Each side also presented voluminous exhibits of studies, surveys and statistical data.

The laws of the State of Washington permit county governments to generate less revenue than city governments. The County Commissioners and the sheriff and his Chief Deputy and others testified as to the general need for more money to provide more adequate services throughout the county. Yakima County levied a per capita property tax of $122 in 1972. It was 37th of the 39 counties in Washington.[2] (Exhibit 48). The county's area is 77.9% public[3] land which is not taxable. (Exhibit 47).

There has been a steady increase in the Sheriff's budget in recent years. In 1970 the budget was $501,374.53 (Exhibit 13, p. 21). In 1972 it was approximately $528,528.00, plus $209,216.00 for operation of the jail. (Exhibits 22 and 103). The testimony of Commissioner Conrad was that the Sheriff's budget for 1973 was approximately $719,000.00 and about $243,000.00 was budgeted for operation of the jail. The law enforcement departments of the county have expanded at a greater rate than other county departments. Law enforcement is funded through the County Current Expense Fund.

Property taxes are a primary source of revenue for the county.

The Yakima County Sheriff's office employed 69 people at the date of trial. Some personnel are Indian to some blood degree, or married to Indians. Twenty-nine were uniformed line deputies working the field. These men were assigned as follows: To the Mountain or Forest Area — 2 men; to the Upper Valley around the City of Yakima — 17 men; to the Lower Valley embracing the Yakima Indian Reservation — 7 men; to traffic patrol throughout the valley — 2 men; to airport security — 1 man. In addition, a three man detective team and a juvenile officer work throughout the county.

Many factors are considered in determining where sheriff's deputies will be assigned. The area denominated as the Upper Valley encompasses 1,862.31 square miles, or about 43.45% of the total area within the county. (Exhibits 32, 33). The population of the Upper Valley is 55,231 in urban areas and 39,322 in rural areas. In the Lower Valley, the urban population is 18,950 and rural population is 31,477.[4]

The County court house is located in the Upper Valley. Sheriff's deputies spend many man hours testifying, serving process, and providing courtroom and prisoner security. Personnel primarily assigned to the Lower Valley seldom work the court house detail. The most experienced sheriff's deputies work in the Lower Valley. To facilitate communications between the residents of the Lower Valley and the Sheriff's Department a toll free after-business-hours direct line to Yakima was being installed at the time of the trial.

As noted in the Opinion and Order granting partial summary judgment, state and county jurisdiction under RCW 37.12.010 does not extend to Yakima Tribal or allotted lands except for eight enumerated areas. Further, over half the reservation is closed by the tribe to protect the forest area from which the bulk of the Tribe's income is generated. The Chairman of the Tribe's Law and Order Committee testified that county sheriff's deputies would need a special business permit to patrol this closed area.

To assure that law enforcement officers have jurisdiction, regardless of whether an offense is committed on Indian or non-Indian land, the agencies involved have been cross-deputized by the Yakima County Sheriff. In turn, the Indian authorities have deputized 20 Yakima Sheriff's office personnel. The Bureau of Indian Affairs has also deputized Yakima Sheriff's deputies.

The Tribal officers testified that their people complain to them of lack of responsiveness by state and county officers, and that there was a general feeling among their members that law enforcement services were inadequate. These witnesses related incidents of cases brought to the prosecutor's attention and no prosecution resulted. They also testified that it cost $228,000.00 in 1972 to provide the reservation with a tribal police force of 18 men. They also said that Indians were offended at what was felt to be disparaging racial slurs on the police radio. For instance, police radio report of a "drunken Indian" was objectionable.

Exhibit 43 substantiates the plaintiff's claim that the jails in the Cities of Toppenish and Wapato are inadequate. Neither the exhibit nor the testimony establish, however, that these jails are only or primarily used to detain Indians and that different facilities are used for non–Indian Indians or that these jails are not typical of a condition of inadequate detention facilities prevalent throughout the State of Washington. (Exhibit 43, p. 59).

Other disadvantages of State jurisdiction were related. The State adoption standards are different than those presently felt relevant to the Local Indian culture. Consequently, Indian children usually are adopted by non–Indian families. Besides experiencing a period of cultural shock, an Indian child not adopted by an Indian family cannot thereafter be an enrolled member of the Tribe. As a result the child loses hunting and fishing rights, support while seeking higher education (if qualified for such pursuit), and entitlement to share in the annual per capita distribution. In cases of divorce, unlike the Tribe, the State is without jurisdiction to impress trust assets for the support of the children.

All parties agreed that the State's assumption of jurisdiction over Indian juveniles (one of the eight enumerated areas) resulted in a less than perfect[5] system of handling juvenile dependency and delinquency because the State has no jurisdiction over Indian adult parents on Indian land. Of course, the Tribe's petition for State assumption of total civil and criminal jurisdiction would eliminate this problem. See: *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 656–658 (9 Cir. 1966).

IV. GENERAL PRINCIPLES OF LAW APPLICABLE.

It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens of similar geographic location. Nor was there any evidence of any conspiracy to discriminate. *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5 Cir. 1971), aff'd on rehearing, 461 F.2d 1171 (5 Cir. 1972), is not in point.

Plaintiff is representative of a class of people historically saddled with disabilities. They have been subjected to unequal treatment and traditionally have been politically powerless to act.[6] This condition has led to such judicial utterances as:

> "It must be remembered that the fundamental consideration is the protection of a dependent people." *United States v. Pelican*, 232 U.S. 442, 450 (1914); and,
>
> ". . . legislation of Congress is to be construed in the interest of the Indian, ..." *United States v. Celestine*, 215 U.S. 278, 290 (1909).

Recently, in *McClanahan v. State Tax Commission of Arizona*, _ U.S. _ (1973), 41 U.S.L.W. 4457, 4460 (March 27, 1973), the court stated that historical incidents of non–Indians taking advantage of Indians has resulted in adoption of the general rule that "Doubtful expressions [in Treaties] are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)."

The purpose of P.L. 83–280 is to "permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs." *Rincon Band of Mission Indians v. County of San Diego,* 324 F.Supp. 371, 374 (S.D. Cal. 1971). See S.Rep. No. 669, 83d Cong., 1st Sess. (1953), 2 U.S. Code, Cong. & Ad. News, p. 2409 (1953).

The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members.

The fundamental constitutional right of equal protection is not shown to have been violated. The right of plaintiff Tribe to be a dependent people, protected by the federal government[7] is not a fundamental right protected by the Constitution. See: *The Mescalero Apache Tribe v. Franklin Jones, Commissioner,* _ U.S. _, 41 U.S.L.W. 4451 (March 27, 1973); *McClanahan v. State Tax Commission of Arizona,* _ U.S. _, 41 U.S.L.W. 4457 (March 27, 1973); *Williams v. Lee,* 358 U.S. 217, 219–220 (1959); *Marchie Tiger v. Western Investment Co.,* 221 U.S. 286, 314–316 (1911); *Matter of Heff,* 197 U.S. 488, 499 (1905). In *San Antonio Independent School District et al., v. Rodriguez et al.,* _ U.S. _, 41 U.S.L.W. 4407 (March 21, 1973), the Supreme Court dealt with the application of the equal protection clause in school

financing. The Texas statutory school financing plan in operation favored certain districts with high assessed valuation of property over those with larger enrollment and small per student assessed valuation. One example cited shows one district contributing $26 per pupil while the more affluent district contributed $333 per pupil.

The opinion states the system does not operate to the peculiar disadvantage of any suspect class. _ U.S. at _; 41 U.S.L.W. at 4415:

> "In sum, to the extent that the Texas system of school finance results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory." _ U.S. at _; 41 U.S.L.W. at 4423.

In the *Rodriguez* case as here, the system impinges on no substantive constitutional rights or liberties. _ U.S. at _; 41 U.S.L.W. at 4426.

V. CONCLUSION

There is little evidence that governmental service provided non–Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the State or County or their officers. It has not been shown that the State and County system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment.

The action will be dismissed. Defendants may prepare judgment and present it.

DONE BY THE COURT this 28th day of June, 1973.

s/Charles L. Powell

United States District Judge

FOOTNOTES

[1]RCW 37.12.010:

"Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further,* That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."

[2]The Tribe alleged at trial that federal revenue sharing funds were improperly used by the Yakima County Commissioners to reduce property taxes rather than remedy or improve inadequate governmental services to rural residents. Whether the county properly used and accounted for these funds is not before the court in this case under the issues of fact and law and contentions raised in the pretrial order. The end result of such use was not shown to favor the non–Indian as compared to the Indian population or disadvantage one more than the other.

[3]Besides the Indian Reservation, the county has within it an Army Firing Range, and part of a National Forest.

[4]The Indian population in the county is 3,882, of which 3,074 live in the Lower Valley on or near the reservation. The total enrolled membership of the Confederated Bands and Tribes of the Yakima Indian Nation is 6,040.

[5]Part of the imperfection may be attributed to a lack of cooperation from the Tribe. The Juvenile Court Services Director testified that he could use more personnel. He has 15 salaried officers and 100 volunteers throughout the county other than the reservation. So far only one Indian volunteer has responded to his several requests for

assistance. There are 15 receiving homes (short term foster homes) in the Lower Valley and one in the Upper Valley. None are operated by the Indians. Since 1971 this department's budget has increased from $286,000 to $424,000 and staff from 5 to 15 probation officers. Of 167 juveniles on probation at the time of trial only 23, or 13.7%, were Indian children.

[6]For instance, the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §461 et seq., was intended "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). See also, S. Rep. No. 721 90th Cong. 2d Sess. (1968), 2 U.S. Code, Cong. & Ad. News, p. 1837, Additional Views of Mr. Ervin, 1854, 1863–1867.

[7]Contrary to plaintiff's contention [Plaintiff's Post Trial Memorandum, p. 3, lines 23–28] the federal government's power over Indian Tribes is not solely derived from the federal government's duty to protect the tribes. *United States v. Kagama*, 118 U.S. 375 (1886). In *McClanahan v. State Tax Commission of Arizona*, _ U.S. _; 41 U.S.L.W. 4457, 4459 n. 7 (U.S. March 27, 1973), the court stated:

> "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U.S. Const. Art. I, §8, Cl.3; Art. II, 32, Cl2. See also *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959); *Perrin v. United States*, 232 U.S. 478, 482 (1914); Federal Indian Law 3."

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

CIVIL NO. 2732

SUPPLEMENTAL CONCLUSIONS OF LAW

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,

Plaintiff,

VS.

STATE OF WASHINGTON, COUNTY OF YAKIMA, DANIEL J. EVANS AS GOVERNOR OF THE STATE OF WASHINGTON AND INDIVIDUALLY, SLADE GORTON AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND INDIVIDUALLY, LES CONRAD, CLIFF ONSGARD AND ANGUS MCDONALD AS COUNTY COMMISSIONERS AND INDIVIDUALLY,

Defendants.

This case having come on regularly for trial and then tried from March 20, 1973, through March 23, 1973, and all parties having appeared by their respective counsel of record, and the court having heard the testimony of witnesses and having considered the exhibits introduced, and having further considered the Pretrial Order filed herein, and certain oral stipulations made and consented to on the record by all parties, and having further considered the briefs and arguments of all counsel, and having previously granted certain motions for partial summary judgment on behalf of defendants, and the

court having filed its memorandum opinion on June 28, 1973 which opinion sufficiently sets out findings of fact and conclusions of law in accordance with Civil Rule 52, and the court having determined, with the agreement of counsel, that certain supplemental conclusions of law should be made and entered herein, the court does now therefore make the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

I.

This District Court has original jurisdiction of this action pursuant to 28 USC § 1362 and 28 USC § 1343.

II.

The State of Washington, in assuming jurisdiction over the plaintiff tribe and its members by the enactment of RCW 37.12.010 (chapter 36, Laws of 1963, and chapter 240, Laws of 1957) without first amending Article XXVI of the Washington State Constitution did comply with the provisions of Public Law 83–280 (67 Stat.588), the Enabling Act of February 22, 1889, the United States Constitution and Washington law in all respects.

III.

The State of Washington, in assuming jurisdiction over the plaintiff tribe and its members by the enactment of RCW 37.12.010 and thus assuming less than full jurisdiction by enumeration of the eight categories of jurisdiction, and providing in RCW 37.12.021 that the tribe can obtain full state jurisdiction by providing the

Governor with a tribal resolution expressing such desire, did comply with the provisions of Public Law 83–280.

IV.

The jurisdiction exercised by the State of Washington over plaintiff tribe and its members by enactment of RCW 37.12.010 is exclusive of that of either the federal government or the plaintiff tribe. The exercise of said exclusive jurisdiction does comply with the provisions of Public Law 83–280.

V.

RCW 37.12.010 does not define crimes, but it rather merely authorizes the extension of state jurisdiction and provides for enforcement of the eight enumerated categories of Washington State criminal and civil laws.

VI.

The laws applicable within the statutory scheme of RCW 37.12.010 are the same laws enforced throughout the rest of the state, and RCW 37.12.010 incorporates all relevant statutory and case law of the State of Washington.

VII.

The State of Washington in assuming jurisdiction over the plaintiff tribe and its members by enactment of RCW 37.12.010 without first obtaining the plaintiff tribe's assent to the assumption of such jurisdiction did comply with Public Law 83–280, did comply with the constitutional and legal standards of due process, and did not violate any inherent tribal sovereignty guaranteed to plaintiff tribe and its members.

VIII.

Plaintiff tribe does not have standing in the justiciable sense, to assert as an abstract proposition that RCW 37.12.010 is an impermissibly vague grant of jurisdiction. The required "justiciable controversy" with regard to this question is not sufficiently present in this case.

IX.

RCW 37.12.010 is not constitutionally invalid or void for vagueness.

X.

The provisions of chapter 37.12 RCW as enacted do meet the constitutional and legal standards of due process and equal protection of person and property.

XI.

In assuming and exercising jurisdiction over the plaintiff tribe the defendants have not deprived the plaintiff tribe or its members of any right, privilege or immunity secured by the Constitution of the United States or Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

XII.

The provisions of RCW 37.12.010 as applied to the Yakima Indian reservation in the exercise of jurisdiction by defendants State of Washington and County of Yakima did not and do not violate the constitutional and legal standards of due process and equal protection of person and property.

XIII.

In assuming and exercising jurisdiction over the plaintiff tribe and its members pursuant to chapter 37.12 RCW the defendants have not deprived the plaintiff tribe of any inherent authority to provide for the safety and welfare of its members.

s/Charles L. Powell

United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

CIVIL NO. 2732

JUDGMENT

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,

Plaintiff,

vs.

STATE OF WASHINGTON, COUNTY OF YAKIMA, DANIEL J. EVANS AS GOVERNOR OF THE STATE OF WASHINGTON AND INDIVIDUALLY, SLADE GORTON AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND INDIVIDUALLY, LES CONRAD, CLIFF ONSGARD AND ANGUS MCDONALD AS COUNTY COMMISSIONERS AND INDIVIDUALLY,

Defendants.

This case having come on regularly for trial and having been tried from March 20, 1973, through March 23, 1973, and all parties having appeared by their respective counsel of record, and the court having heard and considered the testimony of witnesses, and having considered the exhibits introduced, and having further considered the Pretrial Order filed herein, and certain oral stipulations made and consented to on the record by all parties, and having further considered the briefs and arguments of all counsel, and having made and entered

its Findings of Fact and Conclusions of Law, and being fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the assumption of jurisdiction by the State of Washington over the plaintiff tribe and its members and reservation pursuant to Chapter 37.12, RCW, and in particular RCW 37.12.010 is in all respects constitutional and valid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that in exercising its jurisdiction over the plaintiff tribe and its members and reservation pursuant to Chapter 37.12, RCW the defendants have not deprived the plaintiff tribe or its members of any right, privilege or immunity secured by the Constitution of the United States or act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States, and that such exercise of jurisdiction by the defendants is in all respects constitutional and valid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the plaintiff's complaint be and is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendants are awarded their costs and disbursements.

DONE IN OPEN COURT this _ day of October, 1973.

s/Charles L. Powell

United States District Judge

PUBLIC LAW 83-280

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title[44] the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162,[45] as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State

Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title[46] the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately

after section 1359 a new section, to be designated as section 1360,[47] as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a

manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed,[48] but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or

with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

CHAPTER 37.12 RCW

RCW 37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further,* That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted. [1963 c 36 § 1; 1957 c 240 § 1.]

RCW 37.12.021 Assumption of criminal and civil jurisdiction by state—Resolution of request—Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060. [1963 c 36 § 5.]

RCW 37.12.030 Effective date for assumption of jurisdiction—Criminal causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state. [1963 c 36 § 2; 1957 c 240 § 3.]

RCW 37.12.040 Effective date for assumption of jurisdiction—Civil causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state. [1963 c 36 § 3; 1957 c 240 § 4.]

RCW 37.12.050 State's jurisdiction limited by federal law. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session). [1957 c 240 § 5.]

RCW 37.12.060 Chapter limited in application. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon

the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof. [1963 c 36 § 4; 1957 c 240 § 6.]

RCW 37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section. [1957 c 240 § 7.]

PAGES 19-23 of EXHIBIT 1

"Are you Listening Neighbor" — Report of Washington State Indian Affairs Task Force — 1971

CHAPTER FIVE
JURISDICTION ON THE RESERVATION

The Constitution of the United States is the basic authority for the conduct of Indian affairs.* Washington was required by Congress, along with seven other states, to disclaim jurisdiction over Indian lands before the territory was admitted to statehood. But Congress has acted capriciously in Indian affairs throughout the years, often with disastrous results for the native American. A prime example of such capricious action by Congress is Public Law 280, passed in 1953. Congress later recognized that this law was damaging to the interests of both the states and the Indians and consequently modified it. Public Law 280 conveys legislative authority over Indians in certain areas to the states — areas which had been under the exclusive authority of the federal and tribal governments. Although the constitution of the State of Washington disclaims jurisdiction over Indian lands, Public Law 280 was construed by this state as permission to impose state law and order over Indians within the boundaries of Indian reservations. Before Public Law 280, Indian Tribes on reservations had juris-

*The Indian enjoys a unique legal status. This status is a source of conflict with state and local governments. Four major areas of "conflict" are examined in this report: law and order on the reservation, tribal on-reservation zoning authority, water rights, and fishing rights. Other aspects of the Indian's unique legal status are discussed in the first two Appendixes.

diction over all but major crimes committed within their trust territories. The federal government had jurisdiction over felonies. The Indian tribes had their own judges, courts, jails and programs of prevention and rehabilitation.

This new authority caused so much consternation that in 1963 the State Legislature passed Senate Bill No. 56 which prevented the state from imposing complete law and order jurisdiction over Indian tribes unless the Governor received a tribal resolution requesting total state jurisdiction. However, the state was still empowered to impose its authority over Indian country in eight points of the law including: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; operation of motor vehicles upon public streets and roads within the reservation.

It is obvious that with this sweeping jurisdiction over Indian juveniles and family affairs, it is possible for the state to violate the intention of the U.S. Constitution and wipe out tribal customs. The State may reduce or destroy traditional family control which is vital to the Indian communal way of life, abolish undocumented marriages rendering the children of such unions illegitimate, change inheritance laws and confuse a people accustomed to simple tribal law with the sophisticated legal maze of the white man.

It also meant that counties which hired bigoted law officials and elected racially prejudiced commissioners and lawmakers could withhold law enforcement from Indian country, thus encouraging lawlessness. In other

cases, the law has been applied selectively. In almost every instance, the county government has lacked sufficient funds and personnel to enforce the laws equally in the remote rural areas where the reservations are located. Perhaps most frustrating of all to the Indians is their inability to control their own children under state imposed jurisdiction.

This action by Congress has since been amended by the Civil Rights Act, and States are now allowed to return this law and order jurisdiction to the tribes. The State of Washington has jealously guarded this power over Indians and in spite of strong requests for a return of their authority over their own children, the Indians have not been able to retrieve it from the State.

In repeated resolutions by the Northwest Affiliated Tribes, the Indians of Washington State have charged the State with complete failure in administering adequate law enforcement on reservations and have further charged State-imposed law and order jurisdiction with creating "almost insurmountable problems within the reservation." Comprehensive delinquency control planning has been impossible where the tribe has jurisdiction over parents and the State has assumed total jurisdiction over juveniles.

The State also assumes law and order jurisdiction over fee land or non-trust parcels within the reservation. This compounds law enforcement problems because there are few physical boundary lines which indicate clearly whether a crime is committed on trust or non-trust land within the boundaries of the reservation. For purposes of

enforcing game laws, some Indian police have been deputized by county sheriffs in order that they may arrest both Indian and non–Indian for hunting violations.

The complaints of Indians made to the Task Force about racial discrimination, inadequacies and bungling of state law enforcement efforts on the reservation were varied, serious and often bitter. The Indians feel very strongly that in this vital area of their lives the state has invaded their privacy, violated their federally protected rights, and worse, broken its promises.

The Indians cited cases of homicide which they believed to be unsolved because "If it's an Indian, it isn't important." They described unexplained murders and uninvestigated highway accidents on the reservation and a rarity of coroner's juries. The Indians contrasted this neglect of proper law enforcement with testimony of harassment and over attention at per capita payment time. One Indian told the Task Force that at pow–wow time, when the Omak Stampede drew thousands of whites and Indians to the area, the police set up a road block and stopped all Indians in cars for a drunk driver check and waved all non–Indian drivers on without a check.

Another Indian who said he drives an old car which has a malfunction in its steering mechanism testified to discriminatory treatment by the police. He told the Task Force, "My dark skin is just like waving a flag in the policemen's face — every time they see me they think I must be drunk." Several Indians pointed out that traffic and other fines at per capita payment time "are about equivalent to the size of the per capita payment" which

is always published in the newspapers and in the Indian press.

A Colville Tribal Council member told the Task Force, "We're finding out we have less and less power in our law enforcement. We have to take our cases to the Justice of the Peace, and we never hear of them after that. Poaching and trespassing on the reservation is costing us money all the time but the revenue from fines goes to the county. We have very inadequate police protection except right before and after per capita time. The County Sheriff is in Republic, 65 miles away. We want total law and order jurisdiction with authority over non–Indians on the reservation."

In 1965, when making plans to terminate the reservation, the Colvilles petitioned the State to take over law and order jurisdiction. The Colville Tribe also agreed to pay the cost of maintaining law and order on the untaxed reservation out of tribal funds. The Chairman of the Ferry County Board of Commissioners, Carl V. Putnam, explained to the Task Force that the Colville Tribe has paid annually $20,000 each to both Ferry and Okanogan Counties, and an additional $10,000 for a special deputy stationed at the reservation town of Inchelium and for a part time deputy at Keller. In addition the tribe furnished the jail and an automobile.

The Colville Indian Tribal Council is no longer supporting the concept of termination and has recently taken official action to revoke its tribal payments to the counties for law enforcement. Members of the Colville Tribal Council urged the Task Force to seek full retrocession of law and order jurisdiction from the state. They

testified that the law enforcement on the reservation, even with their tribal funding as a subsidy, was woefully inadequate. Since the tribe has withdrawn the subsidy the county has closed the reservation jail and reduced the law enforcement personnel assigned to the area.

The two counties which lie partly inside the Colville Reservation have severe problems in raising enough revenue to support the vital services the population of the area requires. Ferry County is made up primarily of non-taxable land. Eighty-five per cent of the county is either national forests or Indian reservation. Okanogan County was already over $100,000 in the red when its County Commissioner, John Carlson, testified before the Task Force.

The area has no juvenile detention or holding facilities. When the County Commissioners sought federal U.S. Justice crime prevention funds for such a facility, the State Law and Justice Committee approved only a fraction of the needed funds.

Ferry County Commissioners were quick to commend the Colville Tribe for its assistance in operating the county and confessed that presently the county is in need of the Indian subsidy. Quite another attitude was expressed by Okanogan County Prosecutor James Thomas, who said that the county gets along well with the Indians because the Indians "have wanted to assume their responsibility" by making tribal funds available to pay for policing the reservation. He urged the Task Force to ignore the Colville Indians' request for retrocession of law and order jurisdiction and to fight to retain

State authority over the tribe. Thomas said, "The problems of the county are the problems of the Indians." He said that if the Indians were willing to continue to "fulfill their obligation to pay for their law and order services by the county," he wouldn't object to having the fines of Indian arrests go back into the reservation.

Indians throughout the State protested at Task Force hearings that they are not permitted by the State to arrest non-Indians who commit crimes within reservation boundaries nor are they able to keep the fines imposed on Indians who commit crimes. Federal BIA Indian police officers and tribal police officers who enforce law and order over adults and over federal crimes committed on Indian land must turn their prisoners over to county authorities. With the prisoners go the revenue that could help pay for tribal law and order. Cross deputizing of tribal and BIA police would eliminate many problems related to arrest.

Making tribal judges Justices of the Peace would help to eliminate the problem of lost revenue through fines. A few Indian policemen are deputized by County Sheriffs, but this practice is not widespread in the State. Tribal Court systems are generally not recognized as legal or their decisions binding by the non-Indian courts of the State. Non-Indians who commit crimes on Indian land cannot be tried by tribal courts at all. This means that if Indians are to enforce their federal treaty rights outlawing trespass on their beaches, shellfish beds, in their forests, on their fishing lakes and in their trout streams they must eject the trespassers bodily through physical force.

The Quinault Indians have been quite successful at this on their Pacific Ocean beaches and on Lake Quinault. Other Indian tribes have been less aggressive, but Indian testimony indicated they are hardening their attitudes on the subject of trespass. County Sheriffs with jurisdiction over several reservations which suffer trespass violations confessed to the Task Force that they have neither the manpower nor the funds to patrol the areas being invaded and damaged.

Joe De La Cruz, business manager of the Quinault Tribe, told the Task Force that there would be no Quinault juvenile problem if the tribe had total jurisdiction over law and order. He said the tribal judges used to sentence Indian youngsters to cutting brush around town (Taholah) when they got into trouble, and this discipline caused the youth to think twice before again breaking the law.

De La Cruz said that under present conditions juvenile halls are full every weekend and there is no place to put the youngsters who have committed crimes. He said the county often released juveniles without notifying the tribe. Since this county effort has broken down, the Quinault Tribe has started turning over its county–released juvenile delinquents to tribal judges for sentencing in spite of lack of legal jurisdiction.

Quinault Chief James Jackson said the Quinaults will first seek to overturn the law because they feel it is illegal in the first place. And the tribe believes it can do a better job than the state in taking care of their own children; that the children would be better off under tribal jurisdiction. If that alternative fails, the Quinaults will

ask the state for permission to contract the job of handling their Indian juveniles. He said that if the tribe could contract through the State or county to provide juvenile services, the Indians would be regaining authority over their own children, and at the same time the tribe would be recognized as a legitimate governing unit by the State.

The Spokane Reservation has a tribal police force and tribal courts and judges, but the Indians have no power to arrest non–Indians violating the law on their Indian lands. Neither can they collect the fines levied against the Indians and non–Indians arrested by county law officers within the reservation. The tribe asked the Task Force to seek State and Indian concurrent jurisdiction over law and order for the Spokane Reservation. Spokane business manager, Glenn Galbraith, told the Task Force that the Indians want authority to enforce the law when the State and County fail. Other Indian tribes in the State favor clear–cut tribal authority.

WE RECOMMEND THAT:

The State Legislature pass a bill outlining the procedure for retrocession. Retrocession would return to the State's Indian tribes whatever degree of law and order authority over their reservations that the individual tribes agree they can assume. This type of legislation would include provision for the tribe to assume full jurisdiction over law and order, or would provide for the tribe to assume with the State concurrent jurisdiction if the tribe preferred, or would permit the tribe to assume just those areas of jurisdiction which the tribe chose to pay for and administer.

The Legislature provide a means for Indian tribes to contract with the State or counties or cities to provide law and order services to Indians if its tribal government desires to do so. This legislation would have to include provision for State recognition of federally recognized Indian Tribes and their elected Tribal Councils as legitimate governing units.

All Indian police officers who serve reservations be deputized by the Sheriffs of the counties within which the reservations lie so that Indian officers may legally arrest non–Indians who commit crimes on Indian land.

Tribal Judges on Indian reservations be made Justices of the Peace so that they may hear cases of non–Indians who are arrested for committing crimes on Indian land. Fines imposed on both Indian and non–Indian offenders would be utilized solely for reservation law and order programs.

Counties seek the special aid of the State to finance adequate law and order services in areas of the State where great tracts of county land are non–taxable because they are under federal jurisdiction.

County law enforcement officials be required to look upon the Indian reservation as a responsibility equal to that of other areas of the county and provide equal services to the entire county.

Indians be hired and trained in law enforcement by the State at all levels.

PAGE 109 of EXHIBIT 42

1973 WASHINGTON STATE COMPREHENSIVE PLAN FOR LAW ENFORCEMENT

Program Area K–1—INDIAN JUSTICE IMPROVEMENTS

Introduction

Although the state assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension, and investigation of offenses committed on reservations. Of the 30 Indian tribes and bands in the state, with a population of approximately 33,000, 12 tribes now have law enforcement functions. It is estimated that 15 to 18 tribes will have law enforcement functions by the end of 1973.

Law enforcement, judicial, corrections, and crime and delinquency prevention programs on Indian reservations within the state need basic support. The basic manpower and equipment support, which is the most critical need upon the reservations, ordinarily is provided for in cities and counties from general revenues and is not considered an appropriate use of federal law enforcement assistance funds by those jurisdictions.

EXHIBIT 55

TABULATION OF YAKIMA COUNTY AREA AND POPULATION

	Housing Unit	Total Pop.	Urban Pop.	Rural Pop.	% of Rural Pop.	Area	% of Total Area	Ind. W/I By	Pop. Area %	Sheriff's Deputies	
MOUNTAIN AREA	2,606	6,219	–0–	6,219	8.78%	1,126.49 720,953.60	26.28%		81	2	7.69
UPPER VALLEY	32,509	88,334	55,231	33,103	46.76%	735.82 470,924.80	17.17%		727	17	65.39
MOUNTAIN AREA AND UPPER VALLEY COMBINED	35,115	84,553	55,231	39,322	55.54%	1,186.31 1,191,878.40	43.45%		808	19	73.08
LOWER VALLEY	16,152	59,418	18,950	31,477	44.46%	2,423.69 1,551,161.60	56.55%		3,074	7	26.92
TOTALS	51,267	144,971	74,172	70,799	100%	4,286.00 2,743,040.00	100%		3,882	26	

AREA IN SQUARE MILES
Area in Acres
*Total of 29
2 – Traffic
1 – Airport Security

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In the Supreme Court of the United States

October Term, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON, and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellee.

MOTION TO AFFIRM

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CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellee.

MOTION TO AFFIRM

Appellee, hereinafter called "Yakima Nation", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the April 29, 1977 decision and the final judgment of the Court of Appeals for the Ninth Circuit be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether the Court of Appeals decision of April 29, 1977 warrants further consideration by this Court.

STATEMENT OF THE CASE

Yakima Nation objects to Washington's Statement of The Case in that it omits certain pertinent facts essential to a full and accurate statement, and without which the Statement is strongly biased in Washington's favor.

Yakima Nation's Reservation is a checkerboard of fee owned and non-fee owned land. In spite of the provisions of the Enabling Act under which Washington became a member of the Union and a disclaimer of jurisdiction over Indian lands contained in Article XXVI of its Constitution, in 1963 Washington unilaterally assumed partial geographic jurisdiction and partial subject matter jurisdiction within the Yakima Indian Reservation.

The effect of Washington's partial assumption is to impose upon Yakima Nation's Reservation a Washington Law Enforcement pattern that varies from tract to tract depending upon the title to the particular parcel of land and from crime to crime depending upon whether the crime was one of the categories over which Washington had assumed partial jurisdiction. Yakimas, under said Washington law enforcement pattern, have no effective law enforcement on their reservation. Washington acknowledges that reality as does the

Court of Appeals for the Ninth Circuit (Washington Appendix C, Jurisdictional Statement p. 54). In spite of the increase of crime on the Yakima Reservation (Tr. 221, 234), Washington's partial assumption of jurisdiction has resulted in the decline of both felony and misdemeanor arrests on the rural portions of the Yakima Nation's Reservation where most of the Yakimas reside. In 1963, there were 46 felony arrests on this portion of the reservation; in 1971, Washington made 2. In 1963, there were 17 misdemeanor arrests on that portion of the reservation, in 1971 Washington made 4. (Plaintiff's Exhibit 56). Yakima County's clearance rate and amount of coverage is below national and other guidelines. (Defendant's Exhibit 104, Tr. 124). The Yakima Reservation occupies 46.4% of the land encompassed by Yakima County. Reservation residents constitute almost half of the rural population of the county and 80% of Yakima Nation's members live in this rural lower valley portion of the county. No Yakima County Sheriff's office or Washington State Patrol office exists on the reservation. Of the 29 deputy sheriffs assigned to work in the field, only two were assigned to reservation patrol (Washington's Appendex C, Jurisdictional Statement p. 54). The Yakima Sheriff and the Director of the County Juvenile Department have said that Washington cannot do a good job with juveniles when it has no jurisdiction over parents and the Sheriff stated that fragmented jurisdic-

tion hampered police work in other law enforcement areas as well. (Washington's Apprendix C, p. 54, Jurisdictional Statement; Tr. 123, 124, 139, 1972, 167, 168, 174-176). Yakima County, which under state law has the basic burden of law enforcement, has protested that the lack of funds prohibit any further assistance. The legislature has failed to provide Yakima County with relief. (Tr. 64, 279-381, 117). Much of this is because the Washington State taxing pattern does not provide rural areas with funding on a parity with urban areas. (Plaintiff's Exhibit 58, Tr. 43). Yakima County has also used one million dollars of its federal revenue sharing funds to reduce taxes rather than to fulfill the duties of law enforcement that Washington unilaterally assumed. (Tr. 43). Even if funds were available, a qualified expert testified that any reasonable system of law enforcement is impossible under Washington's checkerboard system. (Tr. 307-310). Over half of the Yakima Nation's reservation, for forest protection purposes, is open to state officials only on a permit basis. (Jurisdictional Statement, p. 13).

The Yakimas and the federal government are financially able to provide effective law enforcement on the Yakima Reservation. The Yakimas have a large, well trained police force which, together with the special officers of the Bureau of Indian Affairs and agents of the Federal Bureau of Investigation, is available to provide effective law enforcement on the Yakima Indian Reservation (Tr. 299). In addition, Washington law enforcement personnel are cross deputized so that they can make arrests for prosecution in federal and Tribal Court as they did before 1963. (Jurisdictional Statement p. 13).

The Yakima Nation has requested retrocession of state jurisdiction to enable the Yakimas to return to federal jurisdiction with federal assistance to allow them to work out their problems within the tribal structure. Washington, either does not have, or declines to use, resources to improve the situation, but has so far been unwilling or unable to relinquish jurisdiction. This lawsuit is a by-product of Washington's failure to provide services or retrocede jurisdiction in order that the Yakimas and the federal government could provide adequate protection (Washington's Appendix C, Jurisdictional Statement p. 54).

ARGUMENT

The April 29, 1977 decision of the Circuit Court of Appeals for the Ninth Circuit is plainly correct. The Yakima Nation contended below that Washington's unilateral assumption of jurisdiction is invalid because Washington did not comply with a statutory condition precedent to assumption imposed by Congress in P.L. 83-280 (Act of August 15, 1953, Ch. 505, 67 Stat. 588); that failure to repeal a constitutional disclaimer over Yakimas did not provide the Yakimas with constitutional due process; that the *Treaty with the Yaki-*

mas (12 Stat. 951), which provided that the Yakimas would be governed by their own laws, required tribal consent; that the unilateral partial assumption of jurisdiction by Washington is not authorized by PL 280; that even if unilateral partial assumption by Washington was authorized that the State partial assumption statute is so indefinite, in its listed eight categories of partial subject matter assumed, that it does not meet constitutional standards; that Washington's law enforcement pattern does not meet constitutional standards of due process and/or equal protection in pattern or practice; and that in the alternative, the Yakima Nation has concurrent jurisdiction over offenses on the Yakima Indian Reservation. The Court of Appeals did not rule on all these contentions because it found that Washington's checkerboard jurisdictional structure based on a selection of land title, is the very kind of arbitrary choice forbidden by the Equal Protection Clause. The Court of Appeals thereby held that the portion of the Washington unilateral partial assumption statute that provided for partial geographic jurisdiction was void. The Yakima Nation contends that each and every one of its contentions contesting the validity of Washington's unilateral assumption statute support the Court of Appeal's judgment. However, the limited holding of the Court of Appeals provides such an unsubstantial question for this Court that it is not

appropriate that these questions be argued in this Motion to Dismiss.

The practical impact of the Circuit Court's decision is that it merely relieves Washington of a law enforcement burden she is unable or unwilling to carry and provides the Yakima Nation and the federal government with the opportunity to provide adequate law and order on the Yakima Indian Reservation. (Washington Appendix C, Jurisdictional Statement p. 56). The Yakima Nation is both able and willing to assume this responsibility without any more undue delay. The Court of Appeals decision is effectually limited to the Yakima Indian Reservation. Washington's unilateral partial assumption statute is unique. (Washington's Appendix C, Jurisdictional Statement, p. 59). Even within Washington, almost all Washington Indian Reservations would be unaffected because these reservations are all tribal land held in Tribal trust, have consented to full jurisdiction, or have had state jurisdiction retroceded. (Washington's Appendix C, Jurisdictional Statement p. 56). Even if affected, Washington Tribes may petition for full state assumption of jurisdiction if they, unlike the Yakimas, are unwilling or unable to provide protection to person and property. Under the Court of Appeals limited holding, State assumption with the Tribe's consent is still authorized. (R.C.W. 37.12.021, Washington's Appendix E). The effect of the Court of Appeals limited holding is to bring Washington within

the announced federal purpose in PL 90-284 (Act of April 11, 1968, Title IV, 82 Stat. 73) authorizing assumption only with tribal consent and P.L. 93-638 (Act of Jan. 4, 1975, 88 Stat. 2203) providing tribal self determination. This limited holding does not affect federal enclaves as Washington contends. Federal enclaves are within federal jurisdiction because they are declared federal enclaves and not because of the status of title to property under the Act of July 12, 1952 (18 USC §7, 66 Stat. 589) and the Act of June 25, 1948 (18 USC §13, 62 Stat. 686).

The decision of the Court of Appeals clearly followed this Court's direction. This Court has held that a pattern of checkerboard jurisdiction is "impractical", creates "many practical and legal conflicts" and that when a reservation is established, all tracts included within it remain a part of the reservation until such time as Congress declares these tracts not to be a part of the reservation. *Semour v. Superintendent*, 386 U.S. 351 (1962), *United States v. Clestine*, 215 U.S. 278 (1909), *DeCouteau v. District County Court*, 420 U.S. 425 (1975).

In its jurisdictional statement, Washington has proposed a new post-hoc rationalization for unequal protection. This rationalization is different from that proposed in the Circuit Court. (Washington's Appendix C, p. 34-35). No rationalization was presented by Washington in the District Court. Washington there

contended, that a fundamental right was not a jeopardy. The Attorney General's proposed legislative purpose is not apparent from the face of the statute and the Washington Legislature does not preserve statutory history capable of clarifying the objectives served by its legislative enactments. Certainly, this new rationalization is one that the Yakimas have not heard either in this case or when the Yakimas were protesting Washington's unilateral assumption before the Washington Legislature. There is no evidence in the record that will substantiate the Attorney General's guess as to Washington's legislative purpose.

The Court of Appeals in holding that the questioned statute failed to meet any formulation of the rational basis test did not need to determine whether this is a first-tier equal protection case. Yakima Nation contends that since unequal protection entails the most fundamental protection of property and life, places this case in a category where even a rational basis would not excuse the lack of equal protection. It is hard for Appellee to imagine a more fundamental right than to have one's person and property protected.

Be that as it may, the Court of Appeals decision was correct in holding that Washington's title-based classification fails to meet any formulization of the rational basis test. Because of their unique status, Indian tribes can be sorted out for special legislation by the federal government. *United States v. Antelope* ___ U.S. ___,

45 U.S.L.W. 4361, cited by Washington, follows this Court's holdings in that regard. However, *Antelope*, Supra, is not pertinent to this case. The Court of Appeals held that the distinction based on *land title* within the reservation has no rational basis, not that the distinction between Indians and non-Indians was the unconstitutional provision. In the April 29, 1977 decision, *Confederated Tribes and Bands of the Yakima Indian Nation vs. State of Washington*, the Court of Appeals said:

> "We can detect no rational connection between the stated purpose and the distinction based on land title within the reservation. The state's interest in enforcing criminal law is no less "fundamental" or "overriding" on non-fee lands than on fee lands. An overriding concern with and responsibility for public order necessarily embrace both, once the state undertakes to assume any jurisdiction over either. No showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement. Moreover, no relationship has been suggested or shown between the interest and the ability of the state to provide law enforcement and the fee - non-fee status of the land within the reservation. This checkerboard jurisdictional structure based on a selection by land title is the 'very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .' *(Reed v. Reed*, 1971 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed. 2d 225). Accordingly, the partial territorial assumption of criminal jurisdiction under R.C.W. §37.12.010 is a denial of equal protection."
>
> (Washington Appendix A, Jurisdictional Statement, p. 35).

Even the Attorney General's post-hoc rationale

avails Washington naught. First, Washington proposed that the Yakima Nation had some choice as regards the amount of jurisdiction on trust lands. Is it judicially reasonable to suggest that the Yakima Nation abandon what limited safekeeping that they can provide under this "impractical" checkerboard system which on its face creates "many practical and legal conflicts" to rely solely and irrevocably on Washington who has shown neither the will nor the ability to respond to the needs of the Yakimas? We suggest the answer is in the negative. As this Court said in *Griffin v. Illinois*, 351 U.S. 12 (1955):

> "Law addresses itself to actualities."

As Judge Hufstedler and four other Court of Appeals judges pointed out, this partial jurisdiction statute cannot be made a full jurisdiction statute by merely calling it one (Washington's Appendix C, Jurisdictional Statement p. 49). Likewise, the Attorney General's post-hoc rationale, that the Washington Legislature limited its assumption to what the Washington Legislature believes to be "the real or diminished reservation" must fail from the plain reading of applicable Washington legislation. On the face of R.C.W. 37.12.010 (Washington's Appendix E, Jurisdictional Statement p. 68), the Legislature clearly directs:

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, *reservations*, country and lands. . . ." (Italics supplied).

The Washington Legislature then exempts from full assumption:

> "Indians when on their tribal lands or allotted lands within *an established Indian Reservation . . .*" (Italics supplied).

Clearly the Washington Legislature assumed jurisdiction on Indian Reservations, as federally established, and then exempted from this assumption, protection of person and property and all state jurisdiction but the eight undefined categories on non-fee lands. Such clear legislative intent conflicts with the Attorney General's post-hoc rationale.

Nor could Washington Legislature make a determination that the Yakima Reservation was limited to non-fee lands. This was tried once before by Washington. This Court has made very clear in *Seymour v. Superintendent*, 368 U.S. 351, 353 (1962), that the question of what lands are encompassed within an Indian Reservation is an *exclusive* federal function.

Likewise, this Court has made it clear that any special treatment of Indians must "be tied rationally to the *fullfillment* of Congress' unique obligations towards the Indians." *Morton v. Mancari*, 417 U.S. 552, 555, (1974) (Italics supplied). Here, even if there were a rational basis for a partial geographic assumption by the Washington legislature, it would still fail to satisfy the applicable rational basis test as it results in no gain to the Indians but instead unfairly and unconstitutionally results in the Yakimas not being provided with

equal protection of person and property by Washington. The Attorney General's post-hoc reasonable basis of *doing to* Indians as a unique, separate classification cannot be substituted for this Courts' *doing for* requirement.

Obviously, the Yakima Nation cannot be responsible for the claims made as to the effect of the Court of Appeals decision or the absurd and illogical results that the Attorney General claims will result from this Court's affirmation. Without taking time to refute these contentions, we merely suggest that those are not before this Court nor do we expect any Court will sustain such contentions. Washington's examples merely beg the question before us. The question here is whether the Yakima Nation and the federal government will have the opportunity to provide protection that Washington admittedly is unwilling or unable to assume. Washington's excuse that law enforcement coverage and expenditure is also as poor in other areas does not consider the unequal protection that results from Washington's unworkable checkerboard system.

Self serving statements by Washington's employees or officers will not disguise the record herein that shows that the Yakimas are not receiving adequate protection on their reservation and unequal protection on trust lands. Washington's hard to understand reasoning that since the officers patrolling the lower valley are longer in service than those in the upper valley, (Jurisdiction-

al Statement p. 12) cannot disguise Washington's admitted failure to provide protection of person and property.

The Circuit Court's holding is logical and within this Court's guidelines.

CONCLUSION

The decision of the Court of Appeals is correct and in conformity with this Court's decisions. The Court of Appeals judgment will be limited in its effect and will basically affect only the Yakima Reservation. Affirming the Court of Appeals will enable the federal government and the Yakimas to willingly provide adequate protection for life and property on the Yakima Reservation. Washington either does not have or declines to use resources to provide protection, and under the Washington pattern of checkerboard jurisdiction, cannot provide equal protection. This case has been pending for over six years and further delay is not warranted.

We respectfully submit, therefore, that Washington presents no substantial question for the decision of this Court, and that the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,
JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1977, three copies of this Motion to Dismiss were mailed postage paid, to Slade Gorton, Washington Attorney General, Malachy R. Murphy, Deputy Attorney General, Jeffrey C. Sullivan, Yakima County Prosecuting Attorney, Temple of Justice, Olympia, Washington 98504. I further certify that all parties required to be served have been served.

James B. Hovis,
Counsel for Appellee and
Member of the Bar of this Court.

Supreme Court, U. S.
FILED
JAN 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-388

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General submits this memorandum in response to the Court's Order of October 3, 1977, requesting the views of the United States.

QUESTION PRESENTED

Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the equal protection clause of the Fourteenth Amendment or the statutory requirements of Public Law 280.

STATEMENT

The Yakima Indian Reservation is located in the State of Washington. The Reservation consists of approximately 1,387,505 acres, of which approximately 80 percent is owned by the Tribe or held in trust by the United States. The remaining parcels of land, approximately 270,895 acres, are held in fee and scattered in "checkerboard" fashion throughout the Reservation. Approximately 3,000 members of the Yakima Indian Nation live on the Reservation, along with some 22,000 other residents.

In 1957, purportedly acting pursuant to Public Law 280, 67 Stat. 588 (reproduced in the Appendix to this memorandum), the Washington legislature authorized the Governor to issue a proclamation assuming civil and criminal jurisdiction over any Indian reservation at the request of the appropriate tribal council. Laws of Washington, 1957, ch. 240, § 1. The Yakima Indian Nation made no such request. In 1963, the State amended its statute to provide for assumption of jurisdiction without tribal consent. Under the amended statute, when a tribe consented to state jurisdiction over its reservation, the State assumed jurisdiction over "all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state." [1] When a tribe did not consent, as the Yakima

[1] RCW § 37.12.020, recodified as RCW § 37.12.021 (1964); Laws of Washington, 1963, ch. 36, §§ 5, 6 (J.S. App. E).

Nation did not, the State assumed full civil and criminal jurisdiction with regard to fee lands within the reservation, but with regard to non-fee lands (*i.e.*, tribal lands or allotted lands held in trust by the United States), the State assumed jurisdiction, so far as Indians were concerned, only with respect to eight categories of subject matter.[2]

The Yakima Indian Tribe filed this suit in the United States District Court for the Eastern District of Washington seeking a declaration that the partial assertion of state jurisdiction over its reservation was invalid and an injunction against the continued exercise of such jurisdiction. The Tribe contended (1) that Public Law 280 did not permit a partial assumption of jurisdiction either by geography or subject matter, and (2) that the State had failed to comply with the requirement of Public Law 280 that it amend its constitution before asserting any jurisdiction over Indian lands within the State. The Tribe also argued that the partial assumption of jurisdiction by geography and subject matter, even if authorized by Public Law 280, violated constitutional requirements of due process and equal protection. Finally, the Tribe contended that any state jurisdiction was at most concurrent with tribal jurisdiction.

[2] These categories are compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon public streets, alleys, roads and highways. See RCW § 37.12.010 (1964) (J.S. App. E).

The district court denied relief. On the issue of the State's compliance with Public Law 280, the court held (J.S. App. D 63) that it was bound by the decision of the Ninth Circuit in *Quinault Tribe of Indians* v. *Gallagher*, 368 F. 2d 648, certiorari denied, 387 U.S. 907, determining that the State, without amending its constitution, could assume partial geographic and subject matter jurisdiction over Indian reservations where the tribes had the option of requesting that full jurisdiction be assumed. Though noting evidence that subjection to state jurisdiction caused "disadvantages" for Yakima Tribe members (J.S. App. D 63), the court also held that the "fundamental constitutional right of equal protection is not shown to have been violated" (*id.* at 64).

The court of appeals, sitting *en banc*, adhered to its decision in *Quinault Tribe of Indians* v. *Gallagher*, *supra*, that Public Law 280 allowed the assumption of partial subject matter and partial geographic jurisdiction. Finding that "the applicable legislative history of PL–280 provides reasonable support for *Quinault*" (J.S. App. C 44), and stating that "reversal of *Quinault* * * * at this late stage, along with a new interpretation of PL–280, could lead to unfortunate law enforcement problems for thousands of native Americans" (*id.* at 40), the court declined to "overturn a reasonable interpretation of an ambiguous statute understood for a generation to be the law when the consequences of so doing are so uncertain and far-reaching" (*id.* at 45). The court noted, however, that

"Washington's checker-boarding of criminal jurisdiction might appear particularly inefficient and that its elimination may be desirable" (*id.* at 45).

Five dissenting judges concluded that *Quinault* should be overruled. They noted Congress' recognition that "checkerboard" jurisdiction was "antithetical to effective law enforcement" (*id.* at 53) and pointed out that even the State had agreed that "[t]he Yakimas have no effective law enforcement on their reservation" (*id.* at 54). The dissenters also relied on the legislative history of the 1968 amendments to Public Law 280, which they said indicated that partial subject matter jurisdiction had not previously been authorized (*id.* at 58).

On remand from the *en banc* court, a panel of the court of appeals turned to the constitutional issues and held that Washington's partial assumption of jurisdiction on the basis of "land-title classification" (*i.e.*, full jurisdiction over fee but not over non-fee land) violated the equal protection clause of the Fourteenth Amendment (J.S. App. A 33). The court noted that a Yakima Indian living on non-fee land was denied law enforcement protection from the State of Washington on that basis alone, while a Yakima Indian living on an adjoining parcel of fee land received protection (*ibid.*). This discrimination, the court held, lacked a rational basis because "[t]he state's interest in enforcing criminal law is not less 'fundamental' or 'overriding' on non-fee lands than on fee lands," and "[n]o showing has been or can

be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement" (*id.* at 35). The court further concluded that the unconstitutional provision was not severable from the remainder of the statute and hence that "the whole statute must be rewritten" (*id.* at 36).

DISCUSSION

The decision of the court of appeals in this case, holding that the jurisdiction assumed by the State of Washington over Indian reservations in the State is incompatible with the equal protection clause, merits plenary review by this Court. The court's conclusion that the State failed to demonstrate a rational basis for its legislative choices regarding jurisdiction is not so plainly correct as to justify summary affirmance in a case of such importance. Moreover, we believe that this Court, before reaching the constitutional issue, should fully consider whether Washington's exercise of jurisdiction over Indian reservations comports with the requirements of Public Law 280. If it does not, the judgment below may be upheld without consideration of the Tribe's equal protection arguments.

We also note that this Court has before it similar issues in *Oliphant* v. *The Suquamish Indian Tribe,* No. 76–5729, certiorari granted, June 13, 1977. Because the court of appeals in *Oliphant* did not explicitly address the question whether the State of Washington has validly exercised jurisdiction over Indian reservations within its borders, and because the State of Washington is not a party to that case, we believe

it more appropriate for those questions to be resolved in this case, where they have been fully argued and decided. We therefore recommend that the Court note probable jurisdiction in this case, and consider it, if possible, together with *Oliphant.*

1. The court of appeals in this case held that a "checkerboard jurisdictional structure based on a selection by land title is the 'very kind of arbitrary legislative choice forbidden by the Equal Protection Clause * * *'" (J. S. App. A 35, quoting *Reed* v. *Reed,* 404 U.S. 71, 76). Although it assumed that "the concepts of fundamental rights and strict scrutiny are inapplicable to the title-based classification system that we are testing" (J. S. App. A 34), the court nevertheless struck down the Washington statute under the more traditional rational basis standard, stating that "Washington's title-based classification fails to meet any formulation of the rational basis test" (*ibid.*). The court found "no rational connection between the stated purpose [of the statute] and the distinction based on land title within the reservation" (*id.* at 35).

In the light of past equal protection decisions of this Court, we do not believe that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument," within the meaning of Rule 16(1)(c) of the Rules of this Court. This Court has recently stated that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the

constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303. Moreover, this Court has recognized that "[p]erfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314. Under prevailing principles, therefore, it will be the rare case in which the lack of rational foundation for a statute is so apparent as to warrant a summary affirmance by this Court. In the majority of cases, the Court will be required independently to assess the claimed state interest to determine whether it provides a sufficient rational basis for the challenged discrimination. We believe that this is such a case.

In its jurisdictional statement, the State of Washington claims, *inter alia*, that the state legislature "based the distinction [between fee and non-fee land] upon a desire to allow the tribes, if they wish, to regulate the conduct of their own members on non-fee land" (J.S. 22), specifically with respect to wrongs committed by Indians against fellow Indians (*ibid.*). Under proper circumstances, we believe that such a desire would provide a rational basis for withholding state jurisdiction with respect to Indian trust lands. The court of appeals, however, suggested that the State had not advanced this asserted purpose on appeal, but had claimed only "that jurisdiction [over non-fee lands] was limited to areas of 'fundamental and overriding' concern" (J.S. App. A 34–35). Moreover, the court of appeals found (*id.* at 34) that "[b]oth Indians and non-Indians live on both fee and non-fee land within the Yakima reservation," which raises the possibility that a statute distinguishing between fee and non-fee land is not a reasonable way of accommodating a tribal interest in regulating the conduct of Indians. In any event, whatever the ultimate resolution of these questions, we submit that they should not be decided without full briefing and oral argument.

2. We also believe that this Court, in reviewing the judgment below, should consider whether Washington's limited assumption of jurisdiction over Indian reservations complied with the requirements of Public Law 280. In particular, the Court should consider (a) whether Washington was entitled to assert less than full criminal jurisdiction over trust and tribal lands within the reservations of non-consenting tribes, and (b) whether Washington was required to amend its constitution before assuming any jurisdiction over Indian lands within the State. Should the Court determine that Washington's assumption of jurisdiction was invalid under Public Law 280, the judgment below could be upheld without addressing the constitutional issue.

a. Public Law 280 ceded to certain listed states (the "mandatory states") "jurisdiction over offenses committed by or against Indians in the [specified] areas[3] of Indian country * * * to the same extent

[3] The specified areas included all Indian country within the states except for three reservations that were specifically excepted. Public Law 280, Section 2, 67 Stat. 588.

that such State has jurisdiction over offenses committed elsewhere within the State * * *." Public Law 280, Section 2, 67 Stat. 588. The statute further provided that "the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State" (*ibid.*). Once the states had assumed such jurisdiction, it was further specified that "[t]he provisions of sections 1152 and 1153 of this chapter [applying federal criminal law] shall not be applicable" (*ibid.*).

Public Law 280 also cleared the way for other states (the "option states") to assume criminal and civil jurisdiction over Indian reservations. Section 6 gave consent for states, notwithstanding the provisions of their Enabling Acts for admission to the Union, "to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act" (67 Stat. 590). In passing its statutes assuming partial jurisdiction over Indian lands, the State of Washington (which was not one of the "mandatory states") has purported to act pursuant to Public Law 280.[4]

Despite the contrary holdings of the Ninth Circuit in this case (J.S. App. C) and in *Quinault Tribe of Indians* v. *Gallagher,* 368 F. 2d 648, we seriously question whether Public Law 280 was intended to authorize assumption of partial jurisdiction in the man-

[4] The Washington Constitution contains a provision disclaiming jurisdiction over Indian lands within the State (see p. 13, *infra.*).

ner of the Washington statutes (RCW § 37.12.010).[5] The language of Section 6, consenting to assumption of civil and criminal jurisdiction over Indian reservations "in accordance with the provisions of this Act," is reasonably read to incorporate the requirement imposed on the "mandatory" states that criminal jurisdiction be exercised "to the same extent" and with "the same force and effect" as "elsewhere within the State."[6] This reading is consistent with Congress' concern to end the "hiatus in law-enforcement authority" in Indian country caused by limited federal authority and often non-existent or inadequate tribal mechanisms. See H.R. Rep. No. 848, 83d Cong., 1st Sess. 5–6 (1953), quoted in *Bryan* v. *Itasca County,* 426 U.S. 373, 379–380. The Washington statutes, far from giving state law full force and effect on Indian reservations, make distinctions based on land ownership and subject matter that lead to an inefficient checkerboard pattern of jurisdiction and impose continuing responsibilities on the state, tribal, and federal governments. It is questionable that such a result was intended by Public Law 280.[7]

[5] We agree with the court of appeals (J.S. App. C 38–39) that this issue is not foreclosed by this Court's summary dismissals in *Tonasket* v. *Washington,* 420 U.S. 915, and *Makah Indian Tribe* v. *Washington,* 397 U.S. 316.

[6] Section 7, which applies to states without preexisting legal impediments to assumption of jurisdiction, contains similar language, consenting to the assumption of jurisdiction by states not having jurisdiction "as provided for in this Act" (67 Stat. 590).

[7] We do not believe that mere acquiescence in the statutory scheme by Indian tribes—by failing to ask for state assumption of complete jurisdiction—is sufficient to legitimize an otherwise in-

The legislative history of the 1968 amendments to Public Law 280 also suggests that Washington's limited assumption of jurisdiction over non-fee land is invalid. The 1968 amendments expressly permit piecemeal assumption of jurisdiction, but, as the dissent from the *en banc* decision below points out (J.S. App. C 57–58 and n. 20), their legislative history indicates that such permission represented a change in the law. The change would be justified, of course, by the 1968 amendment providing that further state jurisdiction may only be asserted with the consent of an affected tribe expressed by referendum. See 25 U.S.C. 1326.

We do not suggest that partial assumptions of jurisdiction could never be valid under Public Law 280. It may be, for example, that "optional" states like Washington could have excepted certain reservations in their entirety, as Congress did in conferring jurisdiction on the "mandatory" states under Public Law 280. Similarly, states might be permitted to exercise authority over certain subject matters at the request of a particular Indian tribe. We maintain only that where the State's assumption of partial jurisdiction creates the very sort of jurisdictional uncertainty that Public Law 280 was designed to eliminate, that assumption should not be permitted to stand.[8]

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valid assumption of partial jurisdiction under Public Law 280. Cf. *Quinault Tribe of Indians* v. *Gallagher*, *supra*.

[8] The position taken by the United States on this issue and the issue discussed briefly in the next section represents a shift from the position taken in our *amicus* memorandum in *Quinault Tribe of Indians* v. *Gallagher*, No. 1040, October Term 1966. The shift results from further examination of the legislative history of Public Law 280 (including the 1968 amendments) and analysis of later decisions of this Court. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. 373; *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

b. As we have noted (p. 10, *supra*), Section 6 of Public Law 280 gives consent for states "to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act." The section further provides, however, "[t]hat the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." Although the Washington State Constitution, Art. XXVI, par. Second (RCWA 1966), expressly disclaims "all right and title" to "all lands * * * owned or held by any Indian or Indian tribes," and provides that "until the title thereto shall have been extinguished by the United States, * * * said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States," that provision was not amended prior to the State's assumption of jurisdiction over Indian lands within its borders.

We have set forth in our brief as *amicus curiae* in *Oliphant* v. *The Suquamish Indian Tribe*, No. 76–5729, at pages 54–58, our reasons for believing that amendment of the Washington Constitution was a necessary precondition to the State's assumption of

jurisdiction over Indian reservations.[9] We will not repeat them here. We only note our view that this issue, like the issue of partial jurisdiction, is a substantial one warranting plenary consideration by this Court. In view of the overlap between the issues in this case and the issues presented in *Oliphant,* we suggested in our brief in *Oliphant* (p. 59) that it would be desirable for the Court to consider the two cases together. We continue to believe that this would be desirable, and we therefore suggest that this case be heard on the merits, if possible, during the present Term.

CONCLUSION

It is respectfully submitted that the Court should note probable jurisdiction in this case.

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JANUARY 1978.

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[9] We are sending appellants and appellee a copy of our brief in *Oliphant.*

APPENDIX

(Public Law 280—Chapter 505)

AN ACT To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within

such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer

jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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October Term, 1977

No. 77-388

STATE OF WASHINGTON, et al., Appellants, v. CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION, Appellee.	ERRATA SHEET

Printing or typographical errors in the Brief of Appellants should be corrected as follows:

1. On page 17, line 24, change "now" to "not."

2. On page 32, line 29, in heading III change "no" to "not."

3. On page 42, line 27, after "p." insert "51-54."

4. On page 44, line 27, in the last line of the quote, after "p." insert "35-36."

5. On page 48, line 11, in the last line of the quote, after "p." insert "33-35."

6. On page 53, line 20, after "litigation" change "A" to "20."

7. On page 54, change footnote "A" to footnote "20."

8. On page 55, change footnote "B" to "21."

9. On page 55, change footnote "D" to "22."

10. On page 57, change footnote "C" to "23."

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OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

OPINIONS BELOW

The decision appealed from, *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, is reported at 552 F.2d 1132 (9th Cir., 1977). It is reprinted in the jurisdictional state-

ment as Appendix A, pp. 31-36. The *en banc* opinion of that court on the question of the statutory authority of the State of Washington to assume "partial" jurisdiction over the Yakima Indian reservation, *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, is reported at 550 F.2d 443 (9th Cir., 1977) and is reprinted in the jurisdictional statement as Appendix C, pp. 38-59. The opinion of the United States District Court for the Eastern District of Washington upholding, in all respects, the validity of the State of Washington's assumption and exercise of jurisdiction over the Yakima Indian Nation is unreported and is reprinted in the Appendix at p. 13. The trial court's earlier opinion granting the State and Yakima County's motions for partial summary judgment is also unreported and is reprinted in the Appendix at p. 1.

JURISDICTION

This is an appeal pursuant to 28 USC § 1254(2) from a judgment of the United States Court of Appeals for the Ninth Circuit, holding a state statute, RCW 37.12.010, invalid as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment invalidating that act was entered on April 29, 1977. The Court of Appeals' order denying the Petition for Rehearing was entered on July 1, 1977, and is reprinted in the jurisdictional statement as Appendix B at p. 37. A notice of appeal to this court was filed

on July 27, 1977, and is reprinted in the jurisdictional statement as Appendix F at pp. 70 and 71. Because the Court of Appeals struck down a state statute on United States constitutional grounds, this court has jurisdiction on appeal pursuant to 28 USC § 1254(2). The court noted probable jurisdiction on February 27, 1978.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are the Equal Protection Clause, § 1 of Amendment 14 to the United States Constitution; Public Law 83-280, 67 Stat. 588, 22 USC 1162, 18 USC 1360; Public Law 90-284, 82 Stat. 78, 25 USC 1321, 1322, 1323 and RCW 37.12.010 (§ 1, chapter 36, Laws of 1963, amending chapter 240, Laws of 1957).

The Equal Protection Clause of the United States Constitution reads as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of Public Law 90-284 read as follows:

25 USC § 1321(a):

> "(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated

within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 USC § 1322(a):

"(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 USC § 1323(a)(b):

"(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title

28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

"(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. Pub.L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79."

Public Law 280 and chapter 37.12 RCW are set forth in full in the Appendix at pp. 32-36 and pp. 37-40 respectively.

QUESTIONS PRESENTED

In 1953, by enacting Public Law 280, Congress transferred jurisdiction to five named states over Indians and Indian reservations located within their borders, with certain exceptions, and permitted all other states to assume such jurisdiction after affirmative legislative action. Responding to that act, the State of Washington in 1957 obligated and bound itself to assume civil and criminal jurisdiction over Indians and Indian reservations within the state at such time as a tribe or its governing body adopted a resolution petitioning this state for such an assumption. (Chapter 240, Laws of 1957). In 1963, recognizing that certain areas of fundamental and overriding concern to the State were not being adequately addressed within many of the Indian reservations within the State of Washington, and at the same time recognizing the unique status of Indian tribes and their legitimate interests in self-government, the state legislature amended chapter 240, Laws of

1957 by enacting chapter 36, Laws of 1963, codified as chapter 37.12 RCW. The 1963 enactment obligated the State to assume all jurisdiction over *all* non-Indian lands within reservations, but provided that such general jurisdiction would be exercised over Indians while on their tribal or trust lands only upon the request of the tribe involved.

The 1963 act further provided that *throughout* reservations the State would exercise jurisdiction as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon public streets, alleys, roads and highways (RCW 37.12.010). The 1963 act further provided that "full" jurisdiction would continue over the tribes that had petitioned for and thus became subject to complete state jurisdiction prior to 1963. The opportunity for Indian tribes to seek and obtain the "full" assumption of state jurisdiction by petition was retained.

The Court of Appeals struck down this statutory scheme on equal protection grounds, finding that the act failed to meet "any formulation of the rational basis test."

In noting probable jurisdiction the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Within that issue appellants perceive the following sub-issues:

(1) Whether Congress, in enacting Public Law 280, authorized the State of Washington to exercise "partial geographic and subject matter jurisdiction" within the Yakima Indian reservation.

(2) Whether any rational basis exists for the State of Washington to have assumed jurisdiction within Indian reservations in a manner which recognizes both the fundamental interests of the State and the unique historical and cultural status of trust lands.

In addition, we anticipate appellee will address the following sub-issue, but for the reasons set forth, *infra*, at pages 27-32, we believe that issue is no longer properly present in the case:

(3) Whether Congress, in enacting Public Law 280, required the State of Washington to amend Article XXVI of its state constitution prior to assuming jurisdiction over the Yakima Tribe and its members.

STATEMENT OF THE CASE

A. The Statutory Scheme.

Public Law 280, enacted by Congress in 1953, provided for the immediate transfer of jurisdiction, with certain exceptions, from the United States to the states of California, Minnesota, Nebraska, Oregon and Wisconsin. That same act, in §§ 6 and 7, allowed other states to assume such jurisdiction, provided certain conditions were first met.

Responding to that act the State of Washington

in 1957 obligated and bound itself to assume civil and criminal jurisdiction over all Indians and Indian reservations located within its borders only when a tribe or its governing body adopted a resolution petitioning the State to assume such jurisdiction. (Chapter 240, Laws of 1957) In 1963 the state legislature amended that act by enacting chapter 36, Laws of 1963, now codified as chapter 37.12 RCW. That amendment provided for the assumption of all jurisdiction over Indians and all lands located within an Indian reservation which were not tribal or allotted lands and not held in trust or subject to a restriction against alienation, further, for jurisdiction over all Indians when on such tribal or trust lands only as to compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12-.010);[1] The tribes were still left free to seek and obtain a complete assumption of state jurisdiction by petition. (RCW 37.12.021)

The state thus chose that most traditional and classic of all political decisions, a compromise, between its own fundamental interests and the recognized and legitimate interests of the tribes in their

[1]Of 23 such reservations within Washington, 11 originally petitioned for, and the state assumed, full jurisdiction. The Governor subsequently rescinded the proclamation as to the Quinault Reservation in recognition of an earlier mistake, and retroceded all but the jurisdiction exercised pursuant to RCW 37.12.010 as to the Port Madison Reservation. The validity of that action is one of the issues in a case currently pending before this court. See *Oliphant v. The Suquamish Tribe, et al.*, No. 76-5729, October Term, 1976.

own self government, based upon their own unique, historical and cultural status and their special relationship to "trust lands."

The Confederated Bands and Tribes of the Yakima Indian Nation has not adopted a resolution petitioning the Governor of the State of Washington to proclaim total state civil and criminal jurisdiction over its reservation and members.

The present action was commenced as a declaratory judgment action in the United States District Court for the Eastern District of Washington in May, 1971. The appellee tribe sought a declaration on behalf of itself and its members that the State of Washington's assumption and exercise of jurisdiction over its reservation and members was invalid on both constitutional and statutory grounds. The tribe claimed that chapter 37.12 RCW, the act under which the State of Washington assumed and has exercised jurisdiction over Indian reservations located within its borders violated the Fourteenth Amendment to the United States Constitution, Article XXVI of the Washington State Constitution, the Washington State Enabling Act (25 Stat. 676) and Public Law 280 (67 Stat. 588, 22 USC 1162, 18 USC 1360). The tribe also sought, in the alternative, a declaration that the jurisdiction assumed and exercised by the State was nonexclusive and concurrent with federal and tribal jurisdiction. After extensive discovery and the entry of a lengthy and detailed agreed pre-trial order, the trial court granted Defendant State and Yakima County's motions for

partial summary judgment on seven issues of law. In granting that motion the trial court held that it was unnecessary for the State of Washington to amend Article XXVI of its constitution prior to assuming jurisdiction over Indian reservations; that the State could assume less than full jurisdiction under the provisions of Public Law 280; that state jurisdiction was exclusive rather than concurrent; that the tribe's consent to the assumption of state jurisdiction was unnecessary; that the tribe lacked standing to raise the question of the vagueness of RCW 37.12.010; that regardless of the issue of standing, RCW 37.12.010 met the required standards of definiteness; and that the provisions of chapter 37.12 RCW met the constitutional standards of due process and equal protection. The question of the constitutional validity of state jurisdiction over the Yakima reservation as applied was reserved for a factual determination. After a one week trial the court held that the State's assumption and exercise of jurisdiction over the tribe and its members was valid in all respects under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and dismissed the Complaint. In so holding the trial court said:

> "It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens or similar geographic location. Nor was

> there any evidence of any conspiracy to discriminate. * * * [App. p. 19]
>
> "* * *
>
> "The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members. [App. p. 20]
>
> "* * *
>
> There is little evidence that governmental service provided non-Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the State or County or their officers. It has not been shown that the State and County system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment." [App. p. 21]

On appeal, a panel of the United States Court of Appeals for the Ninth Circuit heard argument in the spring of 1975. Subsequently, in March of 1976 the panel assignment was withdrawn and the court, *sua sponte*, ordered the case to be heard *en banc*, with consideration by the *en banc* court limited to the question of whether or not to overrule the opinion of the court in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir., 1966), in part, beginning at 368 F.2d 655 (Quinault II), in which the court held that Con-

gress, in enacting Public Law 280, had authorized Washington's partial assumption of jurisdiction over Indian reservations. The majority of the *en banc* court in that case adhered to the prior opinion in *Quinault II*, and held squarely that Washington's assumption of less than full jurisdiction was authorized by Congress. The court then remanded the case to the original panel before which it was initially heard to consider the constitutional issues involved. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443 (9th Cir., 1977) (Juris. St. Ap. C)

On remand the panel unanimously held that Washington's so-called "checkerboarding," that is the jurisdictional distinction between trust and non-trust lands within the exterior boundaries of Indian reservations, failed to meet "any formulation of the rational basis test" and thus violated the Equal Protection Clause of the Fourteenth Amendment. The panel also held that under Washington law the statute was nonseverable and struck down all of RCW 37.12.010. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 552 F.2d 1132 (9th Cir., 1977) (Juris. St. Ap. A)

B. **Applicable Facts.**

Plaintiff appellee is an Indian tribe or nation established by treaty with the United States (Treaty with the Yakimas, 12 Stat. 951). At the time of trial the tribe had a membership approaching 6,000, approximately one-half of whom resided within the ex-

terior boundaries of the Yakima Indian reservation. That reservation is located within the exterior boundaries of the State of Washington and principally within the exterior boundaries of Yakima County. The reservation has 1,387,505 acres, of which all but approximately 270,895 acres are held in trust or restricted status by the United States. (Pretrial Order, Record, p. 486) The vast majority of the non-trust land is concentrated in the northeastern portion of the reservation along the Yakima River and the agricultural areas to the west of the Cities of Toppenish and Wapato. (Ex. 34, Tr. p. 20) The reservation at the time of trial had a resident population of approximately 25,000, of which only approximately 3,000 were members of the Yakima Indian Nation. (Pretrial Order, Record, p. 486)

Several large, virtually non-Indian communities are located within the exterior boundaries of the reservation. The principal such communities are the Cities of Wapato and Toppenish. The land located within those cities, as well as other non-Indian communities located within the reservation, is almost entirely owned in fee and occupated by non-Indians. (Ex. 34, Tr. p. 20); (Pretrial Order, Record, p. 486)

The party stipulated, prior to trial, that insofar as the nature and quality of law enforcement services were concerned, all of the residents of Yakima County, including the members of the plaintiff tribe residing within their reservation, fare no worse than the residents of most of the counties of the State of Washington, and better than many. (Stip., Record,

pp. 722-729) The trial court, in its findings following trial, clearly found that to be the case. (Trial Court Opinion, Appendix pp. 19-21) The record is replete with substantial evidence in support of that finding, to the effect that the members of the Yakima Indian Nation, whether residing within or without the borders of their reservation, are not discriminated against and receive substantially the same law enforcement and other services from the state and county as do all other citizens.

Officer Del Young, at the time of trial a Yakima County deputy sheriff with 23 years experience patrolling the Yakima Indian reservation, testified in substance that no discrimination exists in the application of law enforcement services on the reservation. For example, Officer Young testified that the so-called "checkerboard" system of jurisdiction under state law is no hinderance to effective law enforcement on the reservation, at least for someone with some experience in that area. (Tr. pp. 220 and 221) Officer Young further testified that the relationship between the Yakima County sheriff's office and the Yakima Indian tribal police force is good and has been good over the years. (Tr. p. 226) With regard to the question of whether or not preferential treatment would be given to a non-Indian victim of crime within the Yakima Indian reservation over an Indian victim of a crime, Officer Young testified as follows:

> "Q. If you are in a position where a crime is reported to you, and you have the duty to respond in some way, and you would receive two such calls at the same time, approximately, and you haven't gone to either one of them yet, you have just received them, and one originates with a non-indian victim, and one with an indian victim, and the crimes are about equal in severity, would you favor one or the other on the basis of racial identity of the victim?
>
> "A. No, I would not." (Tr. p. 228)

Officer Young had earlier testified, under direct examination from the tribe's counsel, that the so-called "checkerboarding" did not hamper effective law enforcement since in most cases the officer knew whether it was Indian or non-Indian land, and, if doubt existed, it was easy to find out from the agency. (Tr. p. 220-221)

Officer Burdette Kent is a Yakima County deputy sheriff, and an enrolled member of the Yakima Indian Nation. (Tr. p. 231) Officer Kent resides on, and is responsible to patrol the Yakima Indian Reservation during the evening hours. (Tr. p. 233) Officer Kent also testified that the so-called "checkerboarding" system of jurisdiction provides no difficulty in enforcing the law. He said, for example:

> "Well, when we answer a call, we go to the scene. At our level there doesn't seem to be any difficulty." (Tr. p. 233)

Yakima County Sheriff John H. Thompson testified that while it was true that more men were assigned to the Upper Valley (basically, the urban area around the City of Yakima) rather than in the Lower Valley (including the Yakima Indian reservation)

this was because of the higher density of population, and the requirement for more law enforcement officers to handle the higher workload resulting from the higher incidence of serious crime. (Tr. p. 515) While it is true that slightly less than one-third of the uniformed officers of the Yakima County sheriff's office, at the time of trial, were assigned to patrol in the Lower Valley, including the Yakima Indian reservation, that one-third equalled no less than one-half of the work experience of the entire uniformed division of the sheriff's office. (Ex. 216, Tr. pp. 143, 144)

Cross-deputization exists between the Yakima County sheriff's office and the Yakima Indian tribal police. (Tr. p. 141, 222, 342, 343, 519, 520) Both the chairman of the Yakima Tribe's Law and Order Committee and the captain of the tribal police testified that the relationship between the tribe and the sheriff's force through the years was good, and that there existed a spirit of mutual respect between the Indian police and the sheriff's force. (Tr. pp. 348, 451-453)

Over one-half of the land within the Yakima Indian reservation is closed to non-tribal members. (Ex. 34, Tr. p. 20, 344, 346-347) The vast majority of the land within that area is in trust status. (Ex. 34) During the summer months at least one-half of the members of the Yakima Indian Nation reside within the closed area. (Tr. p. 443) Even though the Yakima Indian Nation is now complaining about an alleged inability on the part of the State to provide law enforcement services on trust lands because of

the jurisdictional system established by RCW 37.12-.010, a non-Indian deputy sheriff in order to make an arrest or answer a call in an area encompassing more than one-half of the Yakima Indian reservation would have to seek the special permission of the tribe before entering the closed area. (Tr. pp. 344, 346-347, 444)

SUMMARY OF ARGUMENT

This court has foreclosed discussion of the necessity of the State of Washington to amend Article XXVI of its constitution prior to assuming any jurisdiction over Indians and Indian lands within its borders.

On each occasion that the Supreme Court of Washington or a federal court has considered the necessity of the State of Washington amending its constitution prior to taking jurisdiction over Indians and Indian lands, those courts have squarely held that such an amendment was not required by Congress. In three of those eight cases that question was squarely presented to this court on appeal and in each case the appeal was dismissed for want of a substantial federal question. These dismissals constitute rulings on the merits, which the court should now reconsider.

Washington's jurisdictional system is complete in its application to non-Indians living on Indian reservations. These non-Indians are subject to the same law enforcement system as their fellow non-Indians living off the reservation. Unless the crime

falls under the *McBratney* exception to Section 1152 of Title 18 USC, federal law and federal law enforcement services would be exclusively applicable to all crimes by these non-Indians if Washington's jurisdictional system is found invalid by this court.

Washington's jurisdictional system is similarly complete in its application to Indians living on non-trust lands in the State of Washington. Only on non-trust lands is tribal minor criminal jurisdiction displaced by state jurisdiction. On trust lands that tribal jurisdiction is displaced only in eight limited subject matter areas. Outside of those areas, that tribal minor criminal jurisdiction remains in effect.

Washington's jurisdictional system recognizes the strong historical and cultural link between the concept of tribal self-government and Indian land ownership. This link has been recognized by Congress. Washington has left the choice to sever that link in the case of trust lands to the Indians themselves. In so doing, the state has recognized a legitimate interest in, and has left a certain amount of room for, tribal self-government.

To preserve this measure of tribal self-government, Washington has chosen to tie its limitations of self-government to historical concepts of Indian land tenure. The State's scheme protects Indians from crimes by non-Indians. Washington has left to the choice of each tribe whether state law will protect Indians from crimes by Indians. The State's system allows tribes, if they wish, to regulate the conduct of their own members on trust land, with

some exceptions. In eight subject matter areas of fundamental importance to the welfare of all its citizens, Washington has decided to take and exercise jurisdiction.

Washington's jurisdictional scheme is rational and does not deny *any* of its citizens equal protection of the law.

PL-280 itself authorized the taking of less than total geographic and subject matter jurisdiction.

The Department of Interior has consistently concluded that PL-280 authorized Washington to take less than total jurisdiction. Until October of 1977, the Department of Justice had reached the same conclusion.

In enacting the Indian Civil Rights Act of 1968, Congress ratified Washington's jurisdictional system. Prior to that enactment, Congress was informed of tribal objections to Washington's jurisdictional system. Nevertheless, Congress chose to preserve that system rather than to void it.

ARGUMENT

I. INTRODUCTION: THE FULL SCOPE OF THE CHANGES INVOLVED IN A VALID ASSUMPTION OF STATE JURISDICTION

In striking down Washington's assumption of jurisdiction over the Yakima reservation, the Ninth Circuit panel opinion focused on the effect of that assumption of jurisdiction on Indians, without discussing at all its effect on non-Indians. Since the attack was brought by Indians, this is not surprising.

So narrow a focus, however, leaves out a large portion of the total picture.[2]

The scheme of federal jurisdiction over Indian country which is embodied in 18 USC § 1151 (The definition of "Indian Country"), § 1152 (the General Crimes Act), and § 1153 (the Major Crimes Act) embraces all persons, both Indians and non-Indians, and all land, both trust and non-trust, within a reservation. Accordingly, the question of whether state jurisdiction has been validly substituted for this federal scheme pursuant to PL 280 will affect Indians and non-Indians alike.[3]

This court has recently reviewed this scheme of federal jurisdiction in the context of its application both to a non-Indian (*Oliphant v. Suquamish Tribe*, ... U.S. ..... March 6, 1978) and to an Indian (*Wheeler v. U.S.*, ... U.S. ..... (March 22, 1978). We here briefly review it once again, though from a somewhat different perspective. Our purpose is to identify the changes which a valid assumption of state jurisdiction under PL 280 would make in this scheme, with respect both to non-Indians and Indians.

A. **Changes with Respect to Non-Indians.**

In *Oliphant*, this Court held that the criminal jurisdiction of an Indian tribe did not extend to non-Indians in the absence of a treaty or statute providing

[2]In this introduction, we do follow the panel opinion in focusing on criminal, rather than civil jurisdiction. For criminal jurisdiction was the "central focus" of PL. 280. *Bryan v. Itasca County*, 426 US 373, at 380. (1976)

[3]The Yakima reservation is not unlike the Port Madison reservation involved in *Oliphant v. Suquamish Tribe*, ... US ..... (March 6, 1978) Non-Indian residents vastly outnumber the resident tribal members.

for such jurisdiction. Remaining unanswered after *Oliphant* was the next question: granted that the tribe does not have criminal jurisdiction over a non-Indian, who does? Is it the state? Or is it the federal government?

This question, of course, was not before the Court on *Oliphant*. It is before the Court now.

Our starting point is 18 USC 1152.

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

By its terms, § 1152 makes federal enclave law applicable to all crimes by non-Indians in "Indian country". None of the three exceptions contained in § 1152 are applicable to non-Indians.[4]

Geographically, § 1152 covers all land within the exterior boundaries of a reservation. This is by reason of the definition of "Indian country" contained in § 1151, which provides in pertinent part as follows:

"Except as otherwise provided in sections 1154

[4]The first two exceptions are applicable by their terms to Indians alone. The third exception, i.e., the treaty exception, is also applicable to Indians alone, if it is applicable at all. See *Oliphant*, slip op. 6, n.8.

> and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent * * *"[5]

Further, federal jurisdiction under § 1152 over crimes committed by a non-Indian is exclusive of any state jurisdiction. *Williams v. U.S.*, 327 US 711, 714 (1946).

There is, however, a judicially engrafted exception to the broad scope of § 1152; that statute does not apply to crimes committed by a non-Indian against the person or property of another non-Indian. *U.S. v. McBratney*, 104 U.S. 621 (1882). Such crimes are subject to the exclusive jurisdiction of the state. But if the crime be against an Indian or his property, or perhaps if there is no identifable victim at all, § 1152 is applicable.[6]

Further, the seriousness of the crime is not a factor under § 1152. If the crime has not been expressly defined and made punishable by Congress, 18 USC 13 (the "Assimilative Crimes Act") becomes operative, and state definitions and punishments are incorporated into federal law. Thus, the whole range

[5]*Cf., Seymour v. Superintendent*, 368 US 351, 358 (1962).

[6]We say "perhaps" because we can find no decisions of this Court or any lower federal court extending the *McBratney* exception to crimes in which there is no identifiable victim. An example would be the alleged offenses of Mr. Belgarde in *Oliphant*, who was charged with "recklessly endangering another person" by reason of his high speed driving within the Suquamish reservation. The "[an]other person" would be anyone, Indian or non-Indian, who happened to be in the vicinity of Mr. Belgarde's speeding vehicle. Slip. op. 3.

For a discussion of the problem of the scope of the *McBratney* exception to § 1152, see the Brief for the United States as Amicus Curiae in *Oliphant*, p. 16, n. 12.

of potential criminal conduct is covered by federal law, from the most serious felonies to the most minor misdemeanors.

Residing on the reservation is a total population of approximately 25,000, of which approximately 3,000 are members of the Yakima tribe. See p. 13, *supra*. For these non-Indians, approximately 22,000 in number, the practical consequences which would flow from striking down as invalid Washington's assumption of jurisdiction over the Yakima reservation are now clear:

Washington criminal law would not apply to these non-Indians, unless the crime falls under the *McBratney* exception to § 1152. Federal law and federal law enforcement services would be *exclusively* applicable to crimes by these non-Indians, no matter how serious or how minor the crimes and no matter where they were committed within the reservation.[7]

If, on the other hand, Washington's assumption of jurisdiction is valid, these non-Indians are subject to the same law enforcement as their fellow non-Indians living off the reservation. Sec. 1152 would be completely inapplicable.

Such are the consequences for non-Indians on the reservation; for them, the alternatives are com-

[7]The federal law, of course, may be "borrowed" from state law, pursuant to the Assimilative Crimes Act. But even in these cases, the law enforcement officers must be federal, and the trial must be in federal district court.

Section 1152 was obviously designed for the situation on Indian reservations before they were opened up for non-Indian settlement by the General Allotment Act of 1887, a situation in which non-Indians were "few and far between." Indeed, § 1152 was last amended in 1854, 10 Stat. 270. The only attempt to conform it to 20th century realities is found in PL 280 itself.

plete federal jurisdiction (except as limited by *McBratney*) or complete state jurisdiction. We turn next to the consequences for the Indians themselves.

B. **Changes with Respect to Indians.**

The changes here are more complex. This is by reason of the federal scheme established by 18 USC 1151, 1152, 1153 and the Civil Rights Act of 1968, and complexities in chapter 37.12 RCW as well. We take up first the federal scheme, apart from PL 280 and chapter 37.12 RCW.

Because they only apply to crimes by Indians, the exceptions in § 1152 become important, as do the exceptions to those exceptions found in § 1153, the Major Crimes Act.

Our starting point is § 1152, the first paragraph of which makes federal enclave law applicable to all crimes on a reservation, whether committed by an Indian or non-Indian. If a crime is committed, however, by an Indian against the person or property of another Indian, the first exception in § 1152 (contained in the second paragraph) is applicable, and tribal jurisdiction is exclusive. (This first exception might be viewed as the Indian counterpart of the *McBratney* exception.) In addition, tribal jurisdiction may be exclusive if the tribal criminal system has first punished the Indian offender, even though no Indian victim is involved. This is by reason of the second or "double jeopardy" exception. (For all practical purposes, we believe that the third or "treaty" exception may be disregarded as practically inoperative.) The applicability of these exceptions, it should be noted, is in no way dependent on the seriousness of the offense.

If, however, the crime by the Indian falls within § 1153, (the Major Crimes Act), the § 1152 exceptions become inapplicable; for § 1153 contains no parallel exceptions, and indeed was enacted precisely to cover part of the gap created by those exceptions.[8]

Whether § 1153 establishes exclusive jurisdiction in the United States, or only jurisdiction concurrent with the Tribe, has not been decided by this court. *Oliphant*, p. 12, n. 14. However,

> "The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500." *Oliphant*, p. 12, n. 14.

Though the distinction between "major" and "minor" crimes may not be entirely tidy, a summary description of the federal scheme may be cast in those terms. "Major" crimes committed by Indians are under exclusive federal jurisdiction; "minor" crimes are under the exclusive jurisdiction of the tribe if they involve an Indian victim; and "minor" crimes involving no Indian victim are also under the exclusive jurisdiction of the tribe if the tribe tries and punishes the Indian offender before the United States does.

From this description, the alternatives with re-

[8]For the history of the Major Crimes Act, see *Keeble v. U.S.*, 412 U.S. 205 (1973).

spect to crimes by Indians become clear. If the State's assumption of jurisdiction is valid, state jurisdiction will displace federal jurisdiction with respect to "major" crimes, and will displace tribal jurisdiction with respect to "minor" crimes.[9]

This last point deserves emphasis. The displacement of tribal criminal jurisdiction which will occur if the State's assumption of jurisdiction is valid involves solely minor crimes by Indians. All other displacement affects federal, not tribal jurisdiction.

Further, under Washington's assumption of jurisdiction over the Yakima reservation, even this displacement of tribal criminal jurisdiction is far from total. For it occurs if, and only if, the offense by the Indian takes place on non-trust land. If the offense takes place on trust land, then either federal or tribal law will apply, depending upon whether the offense is "major" or "minor."[10]

To summarize: After passage of the 1968 Indian Civil Rights Act, the only criminal jurisdiction which the Congress has left with the tribe is jurisdiction over minor crimes committed by its own members. The State's assumption of jurisdiction would displace this jurisdiction, but only to a limited extent, *i.e.*, when the crime takes place on non-trust lands.[11] To

[9]We are here assuming, we recognize, that state jurisdiction under P.L. 280 is exclusive of both federal and tribal jurisdiction, rather than merely concurrent. The district court so concluded (App. pp. 6-7), reasoning that state jurisdiction was clearly exclusive in mandatory states, and was intended to be exclusive in option states as well. The Ninth Circuit did not reach this issue.

[10]There is an exception to this general statement. If the crime by an Indian falls within one of the eight special areas contained in RCW 37.12.010, state jurisdiction would cover such a crime even if committed on trust land.

[11]See, however, n. 10, *supra*.

this same limited extent, it would displace federal jurisdiction over major crimes by Indians. But it would totally displace federal jurisdiction over all crimes by non-Indians.

Lastly, the relationship between the two sets of changes should be noted. If Washington's assumption of jurisdiction over the Yakima reservation is invalidated on equal protection grounds, but only as applied to Indians, we see no reason why the jurisdictional changes for non-Indians could not stand.[12] If, however, this assumption of jurisdiction is invalidated on the grounds that it violates the provisions of PL 280, because PL 280 requires assumption of full jurisdiction or none at all, both sets of jurisdictional changes are invalid. Non-Indians as well as Indians remain under the old jurisdictional scheme.

II. THE QUESTION OF THE NECESSITY FOR THE STATE TO AMEND ARTICLE XXVI OF ITS CONSTITUTION, THE SO-CALLED "DICLAIMER ISSUE," IS NOT PROPERLY BEFORE THE COURT.

At the outset, we would like to dispose of one false issue, which is not properly before this court.

In 1957, and again in 1963, Washington assumed jurisdiction over Indians and Indian reservations without first amending Article XXVI of the

[12]The panel opinion would invalidate RCW 37.12.010 in its entirety. "The whole statute must be rewritten, a task manifestly beyond our constitutional competence." Juris. Stat. A, p. 36. That opinion did not, however, consider the severability issue in the context of applying RCW 37.12.010 to non-Indians only. And as that opinion seems to recognize, any severability issue is ultimately one of state law, to be decided by state courts. Juris. Stat. App. A, p. 35, n. 9.

state constitution (the disclaimer clause). That article, in relevant part, reads as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the people of this state:
> "* * *
> "That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * *"

Appellee argued strenuously to both the district court and the Court of Appeals the need for the State to amend that article. Both courts rejected that argument.

In noting probable jurisdiction in this case, the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

We view the court's direction as foreclosing discussion of the necessity of the State of Washington's amending the disclaimer clause prior to assuming *any* jurisdiction over Indian reservations within its

borders, and limiting discussion to the statutory and constitutional validity of the partial geographic and subject matter jurisdiction exercised by the State. Opposing counsel does not agree with this view, however, and feels that the disclaimer issue is still present in the case. Because of this disagreement, on March 10, 1978, we sought the assistance of the clerk in clarifying the scope of the court's language in noting probable jurisdiction. We were subsequently informed by the clerk that we should present any arguments in support of the validity of the State's jurisdiction which we "deemed appropriate" in light of the language of the court's order. Because, as we will demonstrate below, the court has on three previous occasions ruled on the merits in favor of the State's position regarding this issue, we do not deem it appropriate to fully brief and argue it a fourth time, and are confident that the court, in its order noting probable jurisdiction, did not intend to indicate its willingness to reconsider its earlier decision on the merits.

In at least eight previous reported cases, including 3 in which their claims were rejected by this court, various Indian tribes or individual Indians have attempted to persuade some court that the State of Washington could not validly assume any jurisdiction over Indians or Indian reservations without first amending Article XXVI of its constitution.

In each case in which that question was presented to either the Supreme Court of the State of

Washington, or to a federal district or appellate court, those courts squarely held that such an amendment was not required by Congress. *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959); *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, cert. den. 387 U.S. 907 (9th Cir., 1966); *Dixon v. Rhay*, 396 F.2d 760 (9th Cir., 1968); *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590, app. dism'd 397 U.S. 316 (1969); *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744, app. dism'd 420 U.S. 915 (1974); *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217, app. dism'd 420 U.S. 915 (1974). Both the district court and the court of appeals adhere to that view in this case. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443, 444 (9th Cir., 1977), Jurisdictional Statement, Appendix C, pp. 38 and 39. In three of those cases that question was squarely presented to this court on appeal, and in each case the appeal was dismissed for want of a substantial federal question. *Makah Indian Tribe v. Washington*, 397 U.S. 316 (1970); *Tonasket v. Washington*, 420 U.S. 915 (1975); *Comenout v. Burdman*, 420 U.S. 915 (1975). Furthermore, in dismissing the appeals in *Tonasket* and *Comenout*, the court had directly before it the so-called "newly discovered legislative history" relied on so heavily by the appellees here as well the appellants in those earlier cases. See *e.g.*, the Jurisdictional Statement in *Comenout*, October Term 1974 No. 74-707, Appendices M and N.

The dismissals in *Makah*, *Tonasket*, and *Comenout* were direct adjudications on the merits of that issue by this court, and the court below recognized that reality and followed the precedent thus established. *Confederated Bands and Tribes of the Yakima Nation v. State of Washington, et al.*, 550 F.2d 443, 444, Jur. St., Appendix C, pp. 38 and 39. In *Hicks v. Miranda*, 422 U.S. 332 (1975) Justice White, speaking for the majority, said:

> "We agree with appellants that the District Court was in error in holding that it could disregard the decision in Miller II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As Mr. Justice Brennan once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. * * *' Ohio ex rel. Eaton v. Price, 360 US 246, 247, 3 L Ed 2d 1200, 79 S Ct 978 (1959); * * *" 422 U.S. at 343 and 344

Apparently the dissenters in that case, a (5-4 decision) had no quarrel with that language, as their

disagreement was directed only to Part III of the opinion, which dealt with an entirely separate question.

This court had before it all of the relevant arguments which appellees could submit in support of their position on the disclaimer issue, including the "newly discovered legislative history" when it dismissed *Tonasket* and *Comenout* for want of a substantial federal question, and when it noted probable jurisdiction in this case and directed the parties to address the question of whether or not the "partial geographic and subject matter jurisdiction" exercised by the State was statutorily and constitutionally valid (see, *e.g.*, the Memorandum For The United States As Amicus Curiae at p. 12, n. 8 and p. 13, and the Brief For The United States As Amicus Curiae in *Oliphant v. The Suquamish Indian Tribe*, No. 76-5729 at pp. 54-58.

For that reason we are convinced that the court, in framing the issue set out in its February 27, 1978 order noting probable jurisdiction, did not in any way indicate to the parties their willingness to reconsider the disclaimer issue which it has on three previous occasions decided on the merits, and we do not deem it appropriate, and will not fully brief and discuss that issue herein.

III. WASHINGTON'S ASSUMPTION OF JURISDICTION OVER THE YAKIMA RESERVATION DOES NO VIOLATE THE EQUAL PROTECTION CLAUSE

In invalidating Washington's assumption of

jurisdiction over the Yakima reservation, the panel opinion stated:

> "We hold that Washington's partial assumption of jurisdiction based upon *this land title classification* cannot withstand the Yakimas' equal protection attack and we strike down Sec. 37.12-.010." (Footnote omitted) (Emphasis supplied) (Juris. Stat. App. A. p. 33)
>
> "Third, we need not here decide whether the Supreme Court continues to espouse the traditional two tier equal protection approach, because Washington's *title based* classification fails to meet any formulation of the rational basis test.". (Footnote and citations omitted) Emphasis supplied) (I bid., p. 34)
>
> "The operative criterion of the criminal jurisdiction classification at issue is the *status of title.*". (Emphasis supplied) (Ibid.)

The panel opinion thereby showed its complete misunderstanding of exactly what the State did in adopting RCW 37.12.010 and, more importantly, why. Once the statutory scheme embodied in RCW 37.12.010 and the reasons for the adoption of that scheme are understood, any serious equal protection problem disappears. Accordingly, we shall here simply explain that scheme and the reasons for its adoption in the light of the practical problems with which the State was confronted.

Assume a reservation in which there is no "checkerboarding" at all; *i.e.*, all of the land is trust land. No one would then seriously argue that Indians were denied equal protection of the laws if state jurisdiction stopped at the reservation boundary. It is perfectly constitutional to apply state law to Indians

who are outside of the reservation, but not to apply it to Indians inside the exterior boundaries of the reservation.

That was exactly the situation prior to RCW 37.12.010 and is the situation in many states today. (Compare *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), upholding state taxation on an Indian tribe with respect to off-reservation activities, and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) invalidating state taxation of the income of a reservation Indian.)

Of the 23 reservations in Washington, only 7, all small, consist entirely of trust land. On all of the other reservations, a "checkerboard" pattern of land ownership exists, at least to some extent.[18]

What the state legislature did, confronted with this pattern of land tenure within Indian reservations, was simple and sensible. It said that with respect to crimes committed on non-Indian lands within the exterior boundaries of a reservation, state jurisdiction would apply to Indians and non-Indians alike, just as if that land were located outside the boundaries of the reservation.

The Cities of Wapato and Toppenish, for example, are both located within the exterior boundaries of the Yakima Indian Reservation, but are on land almost entirely owned by non-Indians. The state legislature decided that those cities were to be treated

[18]See The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, Office of Program Research, House of Representatives, Olympia, Washington, December, 1977, pp. 24-45, for a description of the ownership patterns on each reservation.

just as if they were outside the exterior boundaries of the Yakima reservation. If a Yakima Indian shops on non-Indian land in downtown Wapato, the legislature saw no reason that state jurisdiction should not apply to him just as if he were in downtown Yakima or Seattle. In other words, the legislature recognized the reality of the so-called "checkerboarding" but left the Indian lands remaining within the exterior boundaries in a special status because of the overriding interest of the tribes in those lands.

We need hardly point out that the checkerboarding on Washington's major reservations and the practical problems stemming from it are not of the State's own making. Rather, they come about by reason of federal policies, as embodied, for example, in the General Allotment Act of 1887.

The term "checkerboarding", incidentally, is a sometimes deceptive term. Large areas of the Yakima Reservation contain almost no non-Indian land; other parts of the reservation, like Wapato and Toppenish, are overwhelmingly non-Indian, both in land ownership and in population. So also on the Puyallup reservation, the term seems inappropriate; for there is almost no trust land at all.

In recognition of that special status for trust lands, the tribes were given a choice, even though PL 280 did not require the state to offer that choice. The legislature in effect said to the tribes: "With respect to your own lands, you can either have state jurisdiction apply, just as on non-Indian lands, and

just as on lands outside the reservation; alternatively, you can continue to have those trust lands primarily subject to federal or tribal law. If you feel so strongly about the concept of tribal self-government that you want to limit the extension of state jurisdiction", the Indians were told, "you can do so. But you can do so only with respect to lands which still retain the character of an Indian reservation, *i.e.*, Indian lands."

The legislature recognized, in short, the strong historical and cultural link between the concept of tribal self-government and Indian land ownership. Whether that link was to be severed in the case of trust lands was left largely to the individual tribe. The State has thus left a certain amount of room for tribal self-government, the amount of room being determined in part by the type of land tenure involved.

What is irrational about that? What *is* irrational is a decision that allows the Indians who made such a choice to challenge its effects as unconstitutional.

In fact, Congress has itself recognized this link between tribal self-government and land tenure. It did so in the General Allotment Act of 1887 (Act of Feb. 8, 1887, 24 Stat. 388), which has been aptly described by President Theodore Roosevelt as " 'a mighty pulverizing engine' to break up the tribal mass."[14] That act, it must be remembered, did essentially two things: It provided the mechanism for individual Indians to receive lands in individual allot-

[14]Cohen, Federal Indian Law (Univ. of N.M. reprint) p. 154.

ments, free from all restrictions against alienation (in other words, to turn trust lands to non-trust lands), after a certain trust period, and simultaneously provided the mechanism for Indians on those lands to become subject to state jurisdiction, thereby eliminating tribal self-government over those lands once they had been turned into fee lands.[15]

Congress again recognized this same link in 1934, in the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984), when it stopped the "pulverizing" by switching to a policy of strengthening tribal self-government and, as part of this policy, brought the allotment system to a halt and continued indefinitely the restrictions on alienation of land already allotted.[16]

If the State of Washington wishes to allow the preservation of a measure of tribal self-government, in order to accommodate the desires of its Indian citizens, why is it irrational to tie those limitations on tribal self-government to historical concepts of Indian land tenure? By giving the Indians the choice either to retain a certain measure of tribal self-government or to subject themselves entirely to state jurisdiction, the State has now been determined by the 9th Circuit to have violated the Indians' rights to equal protection. The rationality of that conclusion escapes us.

In the panel opinion, the 9th Circuit stated:

"* * * Under R.C.W. § 37.12.010, a Yak-

[15]For a general discussion of the purpose and structure of the General Allotment Act, see Cohen, *supra*, n. 2, p. 206 ff.

[16]For a general discussion of the effect of the Indian Reorganization Act on the allotment system, see Cohen, n. 2, p. 217 ff.

> ima Indian living on a parcel of non-fee land who is the victim of a crime has no law enforcement protection from Washington, but a Yakima Indian living on the adjoining parcel of fee land who is the victim of the same crime has law enforcement protection from Washington. * * *" Juris. Stat. App. A, p. 33.

This completely misstates the problem, and misconstrues RCW 37.12.010.

RCW 37.12.010 provides "protection" to a person by regulating the conduct of other persons. Under that statute, if a non-Indian commits a crime against an Indian victim living on a parcel of trust land, the State *does* afford the Indian law enforcement protection. For that non-Indian is subject, under RCW 37.12.010, to the full range of state criminal laws.

What the State has really said, under RCW 37.12.010, to that Indian living on trust land, is this: "We will protect you from the non-Indian. But you must look to the federal government or the Yakima Indian Tribe for your protection from a fellow Indian, and you must do so because *that is the choice that the Yakima Tribe has made for you.*".

The State did not rest its distinction between non-trust and trust lands on the basis of the difference in the "need by the land occupants for law enforcement". Panel opinion, Juris. Stat. App. A, p. 35. Rather, it based the distinction upon a desire to allow the tribes, if they wish, to regulate the conduct of their own members on trust land. It left the question of the need of the Indian land occupants for state law enforcement services up to the tribe itself.

But the choice which the State gave to the Yakima Tribe was, by reason of the eight enumerated categories, not a complete one. The State decided there were eight special areas of subject matter jurisdiction which were so fundamental and important that they would not be left to tribal self-government. But what is irrational about such a decision?

This Court has recently stated that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Moreover, this Court has recognized that "[p]erfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976).

These principles, we submit, are applicable here, and require a reversal of the Ninth Circuit's panel decision.

Further, Washington's jurisdictional system is certainly no less rational than the federal jurisdictional system which this Court upheld in *United States v. Antelope*, 430 U.S. 641 (April 19, 1977).

In *Antelope*, an enrolled Coeur d'Alene Indian was convicted by a federal court of burglary, robbery and the murder of a non-Indian within the boundaries of the Coeur d'Alene Indian reservation. The

first degree murder conviction was based upon the felony murder provisions of 18 U.S.C. § 1111, made applicable to Indians by the Major Crimes Act, 18 U.S.C. § 1153. Under that rule the federal prosecutor was not required to prove premeditation and deliberation, while, if tried in the Idaho court, such intent would have been necessary elements of the crime. The Court of Appeals reversed on the ground that Antelope had been denied both equal protection and due process in that his conviction was racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, where it would have been necessary to prove intent. This court reversed holding that the federal statutes were not based on an impermissible racial classification, and that the challenged statutes did not otherwise violate equal protection. This court there said:

> "There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim. Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, *United States v. Kagama*, 118 U.S. 375 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." 430 U.S. 641, 648.

While admittedly this Court did not directly discuss the equal protection issue in those terms, the

fact is that Antelope was prosecuted by the federal government, rather than the State of Idaho, under a jurisdictional system based upon the status of land.

Under that system, federal law rather than state law applied to Antelope precisely because the crime took place within the confines of a reservation, *i.e.*, because it took place on land that was either trust land at the time of the crime or had been trust land at one time in the past. Reservation boundaries, after all, are really based upon a land title status, albeit often a purely historical status; they mark the geographical limits of what either is or once was trust land.

Washington's system differs from the federal in that it is based upon the current status of land title, not the past status. But this makes the Washington system more rational than the federal, not less.[17]

IV. CONGRESS, IN ENACTING PL 280 AND IN LATER ENACTING THE INDIAN CIVIL RIGHTS ACT OF 1968, AUTHORIZED AND RATIFIED WASHINGTON'S ASSUMPTION OF LESS THAN COMPLETE JURISDICTION OVER APPELLEE AND ITS MEMBERS.

In 1963 Washington could have taken complete

[17]Throughout the United States, on military reservations, in National Parks, and in other federal enclaves there exist systems of triple "checkerboarding"; areas of exclusive federal jurisdiction, exclusive state jurisdiction, and concurrent federal-state jurisdiction. This pattern results from the method by which federal title was obtained, and the response of state legislatures to the acquisition of federal title. See Art. 1 § 8 of the U.S. Constitution. Indeed, the framers of the Constitution themselves contemplated checkerboarded sysems of jurisdiction. See Rupp, Jurisdiction over lands owned by the United States within the State of Washington. 14 Wash. L. Rev. 1 (1939).

jurisdiction over Indians and Indian lands within its boundaries. It chose, however, to accommodate the desires of the Indians to a maximum of tribal self-government and take less than total jurisdiction. Now it faces a challenge by the beneficiaries of that accommodation who assert that the state's concern for Indians' self-government is in violation of the provisions of PL 280.

The State in fact did what Congress required—it *obligated and bound itself* to assume jurisdiction, but, with the exception only of eight specific subjects, it left to the tribes the determination of the extent of the exercise of that jurisdiction over Indians while on Indian land. Since this limited subject matter jurisdiction applies only on trust lands, it has been labeled as partial by the appellees. State jurisdiction is, however, complete as to all non-Indians on reservations since the State placed no geographic or subject matter limitations on its exercise of jurisdiction over them. It is also complete as to Indians on non-trust lands.

The State system was upheld in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir., 1966), cert. den. 387 U.S. 907, and *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), Appeal dismissed, 397 U.S. 316 (1970). See, discussion at p. ....., *infra*. Until the Solicitor General's brief was filed with this court in *Oliphant v. Suquamish Indian Tribe* in October, 1977, it was also the consistent and unequivocal position of the United States that Washington's jurisdictional system was

valid in all respects. *Cf.* Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, No. 1040, October term, 1966, at 5-8, with Brief for the United States as Amicus Curiae in *Oliphant Suquamish Indian Tribe*, No. 76-5729, October term, 1977, at 49-58, and Memorandum for the United States as Amicus Curiae, *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, October term, 1977, at 11-12 and note 8 at 12.

Washington's jurisdictional scheme and the purposes it serves complies fully with the terms of PL 280 *and* with the intent of Congress in enacting it.

A. **Public Law 280 did not preclude Washington from enacting its statutory scheme.**

Two essential concerns motivated Congress to enact Public Law 280: lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement; and the lack of adequate Indian forums for resolving private legal disputes between reservation Indians and between Indians and other citizens. *Bryan v. Itasca County*, 426 U.S. 373, 379 and 383 (1976). While PL 280 was assimilative in character, it was not intended to effect complete assimilation of Indians and Indian tribes. *Id.*, at 387-389. When Congress intended complete assimilation, it knew how to accomplish it. *Id.* at 389. It did not transfer jurisdiction over the tribes themselves to the states and it contemplated the continued vitality of tribal government. *Ibid.*

While neither the actual text of the act nor the

legislative history provide a definitive answer to the "partial" jurisdiction issue, what can be gleaned from the act and the circumstances surrounding its passage, we suggest, supports the proposition that Congress intended to permit Washington to choose its unique jurisdictional scheme.

The language of PL 280 itself supports the State's position in that respect. Section 6 of the act gave the consent of the United States to those States having disclaimer provisions in any enabling act to remove existing legal impediments to the assumption of civil and criminal jurisdiction over Indians and Indian lands "in accordance with the provisions of this act". Section 7 of that act provides:

> "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time *and in such manner* as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Emphasis supplied) (App. p. .....).

Reading §§ 6 and 7 of PL 280 together, as one must, Congress in 1953 gave its consent to any state not having jurisdiction over Indians and Indian lands to assume such jurisdiction, either totally or "in such manner," *i.e.*, less than total, "as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

The legislative history reveals that Congress was aware of a variety of responses to the option of taking

jurisdiction over criminal or civil matters involving Indians and Indian land. Senate Report 699, 83rd Congress, 1st Sess. 6-7 (1953), Letter from Assistant Secretary of Interior to Chairman of House Interior and Insular Affairs Committee. In considering § 7, the House Interior Committee reported as follows:

> "This provision would operate with respect to Nevada, and other states similarly situated. In Nevada, authorities of some counties have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying federal subsidy. The reported bill leaves open for such states the door to acquiring jurisdiction in the future." Senate Report 699, at p. 6.

The report does not intimate that such approaches to jurisdiction would be inappropriate under PL 280 if pursued by the option states.

Congress also assumed that some experimentation might occur once a state had gone through that "open door" to acquire jurisdiction in the future. This assumption is indicated by the fact that the Department of Interior conferred extensively with representatives of mandatory states and the Indian tribes before presenting a bill to Congress in 1953. *Id.* at 6 and 7. Both the mandatory states and the tribes therein had agreed to an assumption of complete civil and criminal jurisdiction prior to the introduction of the bill. However, very few of the option states and tribes therein were consulted. By failing to consult them extensively but by vesting option states with the power to assume jurisdiction, it is reasonable to

conclude that Congress was prepared to permit various jurisdictional arrangements to be developed at the state level.

Although Congress gave no direct indication of how much less than complete jurisdiction might be assumed, it did give some indication that partial geographic and subject matter jurisdiction was acceptable.

Textual support for the assertion of partial jurisdiction, in a subject matter context, can be found in § 7 of PL 280. There Congress gave the option states consent to take jurisdiction "with respect to criminal offenses *or* civil causes of action."[18]

By its failure to repeal certain statutes, Congress gave further evidence of its continuing intent to allow option states to experiment with partial subject matter jurisdiction. In 1929 Congress authorized the Secretary of Interior to promulgate regulations allowing state authorities to enter Indian trust and non-trust lands for the purpose of inspecting health and educational conditions and enforcing sanitary and quarantine regulations. 25 USC § 231. Though the Department of Interior has never promulgated regulations under the statute, this does show a Congressional intent to allow partial subject matter jurisdiction. An amendment to the statute in 1946 authorized

[18]Although § 6 uses the language "assumption of civil *and* criminal jurisdiction," that assumption is done "in accordance with the provisions of this act," that is, § 7. Furthermore, Congress showed no aversion to such partial assumptions of jurisdiction when it separately conferred criminal jurisdiction over Indians and Indian lands on the State of New York in 1948 and civil jurisdiction over the Indians and Indian lands on New York in 1950. See, Act of July 2, 1948, Chap. 809, 54 Stat. 1224, 25 USC § 232 (criminal jurisdiction); Act of September 13, 1950, Chap. 947, 64 Stat. 845, 25 USC § 233 (Civil jurisdiction).

the states to enforce state compulsory school attendance laws against Indian children and parents. 25 USC § 231(a). This provision shows Congress' intent to allow the states to deal with particular subject matter areas. The failure to repeal these provisions in 1953 suggests a continuing intent on the part of Congress to allow option states to experiment with partial subject matter jurisdiction.

Public Law 280 itself not only authorizes but requires partial geographic jurisdiction. Section 2(a), 18 USC § 1162(a) exempted from the jurisdiction of Minnesota, the Red Lake Reservation, from the jurisdiction of Oregon, the Warm Springs Reservation, and from the jurisdiction of Wisconsin, the Menominee Reservation.

Both the dissenting judges in the Ninth Circuit's *en banc* opinion in this case and the Solicitor General of the United States agree that the assumption of jurisdiction on a reservation by reservation basis, rather than over all Indian country within the state, was within Congressional intent. *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443, at 450 (9th Cir. 1977); Brief of the United States in this case, at 12.

There is no indication in the House or Senate reports accompanying PL 280, or in the formerly unpublished transcripts of hearings held by the committee which approved PL 280 or in the statute itself to suggest that PL 280 was designed to resolve jurisdictional distinctions based on the trust or non-trust

status of land. The act maintains the separate status of tribal trust land in the proviso clauses of § 2(b) and § 4(b), which provide as follows:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * *" (App. p. .....)

The very use of a trust land distinction in these sections of PL 280 suggests the appropriateness of a Washington's implementing legislation which gives significance to that distinction. Significantly, in 1967, the United States unequivocally supported that legislation. See Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, No. 1040, Oct. Term, 1966, at 5, 7-10.

Even today, the Solicitor General, in the context of a different case, continues to espouse on behalf of the United States a position totally inconsistent with the one he takes here. Compare the Petition for Certiorari in *U.S. v. John*, Oct. Term, 1977, No. 77-836 at 11-12, 17-19, with the memoranda for the United States in *Oliphant v. Suquamish Indian Tribe*, *supra*, and in this case. In *John* the respondents were charged with the violation of the Major Crimes Act in Indian country in Mississippi. The Court of Appeals dismissed the prosecution on the basis, *inter alia*, that Congress could not have intended federal jurisdiction to apply to Indian trust lands interspersed with non-

Indian land in checkboard fashion. But in that case the Solicitor General vigorously supported the establishment of a checkerboard system of jurisdiction in the State of Mississippi—a position he opposes here.

B. **The State's position is consistent with the federal interpretation of congressional intent prior to October of 1977.**

The construction of an act of Congress by the Interior Department, the agency with the primary responsibility for Indian affairs, is clearly entitled to consideration by this court, *Shapiro v. U.S.*, 335 U.S. 1, 12 note 13 (1947); *U.S. v. Jackson*, 280 U.S. 183, 193 (1930). In 1963 the Department of Interior was requested by the chairman of the Committee on Interior and Insular Affairs to comment on S. 143, a bill which, if passed, would have amended PL 280 explicitly to provide for the assumption of partial jurisdiction.

In a letter dated April 17, 1963, over the signature of Assistant Secretary John A. Carver, Jr., commented on those provisions of S. 143, a bill which would have amended §§ 6 and 7 of PL 280:

> "The bill amends sections 6 and 7 in the following respects:
> "* * *
> "2. A State may, by agreement with the tribe, assume criminal or civil jurisdiction with respect to a designated geographical area of Indian country, or with respect to designated subjects such as marriage and divorce, juvenile offenses, commitments to State institutions, etc. The State need not assume full jurisdiction. *We do not regard this as a change in the law. It merely*

makes explicit a conclusion which we think is implicit from the present language of P.L. 280." (emphasis supplied) A copy of that letter is attached hereto as App. A.

The Department of Interior continued to maintain that PL 280 authorized a partial assumption of jurisdiction in 1968. That year Harry R. Anderson, Assistant Secretary of Interior, responded to a request from Wayne N. Aspinall, concerning Interior's recommendations on S. 1843. Title III of this bill was the immediate predecessor to Title IV of PL 90-284, the 1968 Indian Civil Rights Act. Mr. Anderson observed:

"Title III, which relates to State assumption of civil or criminal jurisdiction over Indian reservations, changes the present law now embodied of section 7 of Public Law 280, 83rd Congress: * * * *(b) by making explicit an authority which we believe is now implicit—an authority to assume partial jurisdiction, or piecemeal jurisdiction either by geographic area or by subject matter;* * * *" (emphasis supplied)

In the letter Mr. Anderson observed further:

"The second change is a change of form and not a change of substance, because *the present law permits the States to assume partial jurisdiction either by geographic area or subject matter.* Some of the States have in fact done so. For example, Nevada has assumed jurisdiction over limited areas. Idaho has assumed jurisdiction over limited subject matter (compulsory schools, public assistance, domestic relations, mental illness, juvenile delinquency, dependent children). *Washington has assumed jurisdiction over both limited areas and limited subject matter.*" (emphasis supplied)

Inasmuch as this part of Title III is a clarification rather than a change of present law, we have no objection to it."

Letter from U.S. Department of Interior to The Honorable Wayne N. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, March 27, 1968, reproduced at pp. 24-26 of Hearings on Rights of Members of Indian Tribes, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong. 2d Sess. (1968). The letter is attached hereto as Appendix B.[19]

Until 1977 the Solicitor General took a position consistent with that of the Department of Interior. In his Memorandum for the United States in *Quinault Tribe of Indians v. Gallagher*, Oct. Term, 1966, No. 1040, at 5, 7-10, he fully supported the validity of Washington's assumption and exercise of jurisdiction over Indians and Indian reservations.

C. Subsequent legislative action confirms Congress' intent to preserve Washington's jurisdictional system.

(1) *The law of Quinault v. Gallagher.*

In *Quinault Tribe of Indians v. Gallagher*, *supra*, at 653, 657-658, and *Makah Indian Tribe v. State*, *supra*, at p. 489, 491-492, the tribes objected to Washington's jurisdictional scheme as violative of PL 280, in part, because it provided for " partial" jurisdiction over them.

In *Quinault*, the Court of Appeals dealt with the

[19]In the letter Mr. Anderson reviews a bill, S. 1843, which amended PL 280 to provide in explicit terms that States may assume "such measures of jurisdiction over any or all of" offenses committed within "Indian country or any part thereof as may be determined" by the States. Title III, Section 301(a) of S. 1843. A similar provision is contained in Section 302(a) of the same bill.

"partial" jurisdiction issue by treating Washington's assumption as total:

> " * * * We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and gubernatorial proclamation. * * *" 368 F.2d 657, 658.

The court concluded that if the Quinaults felt aggrieved because state jurisdiction exercised under the 1963 act was not being exerted to the fullest extent possible:

> " * * * all it has to do is provide the governor with a tribal resolution of the kind called for in section 5 of that act (RCW 37.12.021). A governor's proclamation would necessarily follow, and a full exertion of state jurisdiction would be achieved." 368 F.2d 658.

When the question was raised once again three years later before the State supreme court, that court adopted the reasoning of the Ninth Circuit in *Quinault* and again affirmed the validity of the State act. *Makah, supra.*

After the *Quinault* decision, the law in the State of Washington and throughout the Ninth Circuit was that PL 280 did allow the assumption of jurisdiction both by subject matter and by geographic area. When Congress had been informed in 1963 that PL 280 allowed the partial assumption of geographic and subject matter jurisdiction, of course, no federal court

had ruled on the issue. In its 1963 opinion, the Department of Interior reached the same result as the Ninth Circuit later adopted in *Quinault.* In its 1968 opinion the Department again reached the same result. In his memorandum for the United States in *Quinault*, the Solicitor General had also concluded that Washington's jurisdictional scheme was valid under PL 280.

While Congress is deemed to know the state of the law when it enacts legislation, including decisional law, *Shapiro v. U.S.*, 335 U.S. 1, 16 (1947); and the pertinent administrative agency's interpretation of the law, *Missouri v. Ross*, 299 U.S. 72, 75 (1936); there are other indications that Congress had been specifically informed of the *Quinault* litigation. On June 23, 1965, during hearings on the constitutional rights of American Indians, the Quinault Tribe told the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary about the *Quinault* litigation.[A] James Jackson, Tribal Chairman of the Quinault Tribe, objected to the tribes having been brought under the provisions of the 1963 law which extended "partial jurisdiction to the reservation regardless of the wishes of the tribe concerned." 1965 hearings at 102. Mr. Jackson requested an amendment to S. 966, a predecessor to PL 90-284, pursuant to which the State and the tribe would share jurisdiction only to the extent that agreement between the two was reached. 1965 hearings at 101-103. Senator Ervin inquired into the status of the

Quinault litigation, at which point Charles Hobbs, an attorney for the Quinault Tribe, responded:

> "Mr. Hobbs: It is to be argued before the Ninth Circuit Court of Appeals on July 8. We lost in the trial court, and the effort there will be to get a reversal." 1965 hearings at 103

(2) *In enacting the Indian Civil Rights Act of 1968, Congress ratified Washington's jurisdictional scheme.*

When Congress finally amended PL 280 by § 403 of Title IV of the 1968 Civil Rights Act, two years after the decision in Quinault, it ratified all jurisdictional schemes enacted under PL 280. Section 403 reads, in pertinent part, as follows:

> "(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, *but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.* Public Law 90-284, Title IV, Section 403, April 11, 1968, 82 Stat. 79. (Emphasis supplied)

Congress' intent was clear: it simply halted the process of the states taking jurisdiction without tribal consent, but stated clearly that the status quo was to be preserved.

Prior to passage of the Civil Rights Act of 1968, Congress was aware of Washington's jurisdictional scheme. Not only was Congress aware of tribal objections to partial jurisdiction, but Congress was also informed by the Yakimas' representatives that S. 966

[A]The appellee Yakima tribe was also represented at the 1965 hearings on the predecessor bill to PL 280, S. 966. (Hearings before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., hereafter, 1965 hearings.)

did not correct these perceived abuses. 1965 hearings at 245, 253 and 254.

The Washington jurisdictional scheme was characterized in unflattering terms by the Yakima Tribal Council as an unworkable system of legal chaos. 1965 hearings at 243, 244. Members of the tribal council engaged in a specific discussion of Washington's partial jurisdiction scheme with Senator Ervin 1965 hearings at 253-255. There is no doubt that Congress was exposed to their objections. Nevertheless, it chose to save that jurisdictional scheme, rather than to void it.[B]

The congressional committee which reported S. 1843, which became the 1968 Indian Civil Rights Act, noted that it "repeals section 7 of Public Law 83-280 which grants civil and criminal jurisdiction to states, but will not affect any cession of jurisdiction to a state prior to its date of repeal." S. Rep. No. 841, 90th Cong., 1st Sess. at 16.[D]

Further evidence of Congress' intent to save Washington's jurisdictional scheme appears in the 1968 hearings on S. 1843, whose language ultimately became the language of PL 90-284, the 1968 Indian Civil Rights Act.

[B]Attorneys for the Makah Tribe also informed Congress that their jurisdictional problems with the State of Washington were not addressed by PL 280 since S. 966 did not affect prior assumptions of jurisdiction. Statement of Ziontz, Pirtle, Fulle in 1965 hearings at 356-358.

In 1968 a new set of hearings took place on a bill containing the same language as S. 966 with regard to prior cession of jurisdiction, Senate Bill 1843. S. 1843 was ultimately adopted and became part of the 1968 amendments to PL 280. 1968 hearings at 6-9.

[D]One sponsor of a bill with retrocession language identical to that of § 403(b) of the Indian Civil Rights Act of 1968, H.R. 15122, 90th Cong. 2d Sess., also observed that cessions of jurisdiction made to States prior to 1968 would be preserved. 1968 hearings at 32.

During the 1968 hearings, Arthur Lazarus, attorney for the Hualapai, Metlakatla, Nez Perce, Oglala, Sioux and other Indian tribes, appeared before the House Committee considering the 1968 amendments to PL 280 and submitted a written statement. 1968 hearings at 114. After reading that statement, Senator McClure of Idaho confronted Mr. Lazarus:

> "Mr. McClure: Mr. Lazaraus, on page 5 of your statement, at the bottom of the page you say, 'One of the major objections to Public Law 280 is its "all or nothing" approach.' I would assume from that if this were not clear or if this is to be modified, you would not have a major objection to Public Law 280.
> "Mr. Lazarus: There are two major objections to Public Law 280. One is the lack of consent and and the all or nothing approach as part of the lack of consent. A piecemeal approach implies negotiation back and forth between the Indians and the state authorities.
> "Senator McClure: I hate to cut you off but if I want to ask another question I am going to have to. And, I would like to refer you to page 4 of the Department of Interior's statement, a letter of March 27, 1968. They stated the second change is a change of form and not a change of substance because the present law permits the states to assume partial jurisdiction either by geographic area or by subject matter. Some of the states have in fact done so. For example, Nevada has assumed jurisdiction over limited areas. Idaho has assumed jurisdiction over limited subject matter. Does this reach a portion of your objection?
> "Mr. Lazarus: Yes, it does reach a portion of my objection, but it doesn't reach every state because the Department of Interior didn't mention all the states." 1968 hearings at 113-114.[c]

The validity of the State's jurisdiction is further buttressed by section 403(a) of Title IV of the Civil Rights Act. In subsection (a), the United States was authorized to

> " * * * accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section."

This text is noteworthy in two respects. First, Congress intended to preserve prior cessions of jurisdiction and leave retrocession to the states, without tribal consent; and secondly, that any state could return "all or any measure of" jurisdiction assumed under the 1953 act.

As one reviews the long legislative history of the 1968 Civil Rights Act, a striking parallel emerges. The debate which took place in the legislative hearings on the issue of partial assumption of jurisdiction by various western states had its counterpart in the debate between Judge Sneed and Judge Hufstedler, the authors of the majority and dissenting opinions, respectively, on this same issue. (See Juris. State., App. C) In his majority opinion, Judge Sneed emphasized the undesirable consequences which would flow from invalidating the *status quo*. In her

[c] As the letter from the Department of Interior to the House Committee reveals, see p....., *infra*, the letter from which Mr. McClure quotes also states: "Washington has assumed jurisdiction over both limited areas and limited subject matters."

dissent Judge Hufstedler disagreed sharply with Judge Sneed's appraisal of those consequences, and emphasized the undesirable consequences which would flow from preserving the *status quo.*

What both failed to notice was that Congress itself had resolved the debate—in favor of Judge Sneed. It deliberately preserved the *status quo.* And it did so after having had all of the policy issues laid before it.

By permitting such "partial" retrocessions Congress must have foreseen that certain states would choose varying systems of partial jurisdiction, including a system of so-called "checkerboarding" which the tribe asserts Congress *must have* so clearly meant to avoid in 1953. Thus, under the 1968 amendments, had Washington taken full jurisdiction, it could nevertheless have wound up, *with the blessing of Congress*, in exactly the same position it is in today under the 1963 act.

CONCLUSION

In summary, the State's jurisdictional system is valid in all respects. It is founded upon an undeniably rational basis and fully provides for the equal protection of the laws to all of the state's citizens. It was adopted in full compliance with the statutory requirements which Congress incorporated into Public Law 280. Furthermore, if any doubt existed regarding Public Law 280's authorization of the assumption of partial geographic and subject matter jurisdiction, all such doubt was resolved in the State's

favor by Congress in enacting the Indian Civil Rights Act of 1968, and therein ratifying the State's previous assumption of jurisdiction.

Respectfully submitted,

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MALACHY R. MURPHY,
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Prosecuting Attorney
Attorney for Appellants
Yakima County and Les Conrad,
Graham Tollefson and Charles Rich

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 1978, three copies of the Brief of Appellants were mailed, postage paid, to James B. Hovis, Attorney at Law, 316 North Third Street, Yakima, Washington, 98907, counsel for appellee. I further certify that all parties required to be served have been served.

MALACHY R. MURPHY,
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

APPENDIX A

April 17, 1963

Dear Senator Jackson:

Your Committee has requested a report on S. 143, a bill "To authorize assumption by the various States of civil and criminal jurisdiction over cases arising on Indian reservations with the consent of the tribe involved; to permit gradual transfer of such jurisdiction to the States; and for other purposes."

We recommend that the bill be enacted with the amendments suggested below.

Sections 6 and 7 of P. L. 280, 83rd Congress, permit any State, by its own legislative action and by amending its constitution if necessary, to assume jurisdiction "with respect to criminal offenses or civil causes of action, or with respect to both" in the areas of Indian country within the State "at such time and in such manner as the people of the State" wish. The bill amends sections 6 and 7 in the following respects:

1. A State may assume criminal or civil jurisdiction only with the consent of the tribe occupying the particular Indian country involved.
2. A State may, by agreement with the tribe, assume criminal or civil jurisdiction with respect to a designated geographical area of Indian country, or with respect to designated subjects such as marriage and divorce, juvenile offenses, commitments to State institutions, etc. The State need not assume full jurisdiction. We do not regard this as a change in the law. It merely makes explicit a conclusion which we think is implicit from the present language of P. L. 280.

3. The jurisdiction assumed by a State may be retracted by agreement between the State and the tribe.

Our files show that many Indian tribes and associations of friends of Indians opposed P. L. 280 because sections of 6 and 7 permitted the assumption of State jurisdiction without Indian consent. Many tribes have had a fear of State jurisdiction because they thought it meant the extension of all State laws, and the Indians did not understand what complete State jurisdiction would mean. Many tribal groups have indicated informally that they would be agreeable to having the State assume jurisdiction in certain specified areas, such as protective services for dependent or delinquent children. We believe that a piecemeal extension of State jurisdiction on a subject-matter basis, as specified in the bill, would allay the fears, real and imagined, of the Indian people by making it possible for them to understand exactly which State laws would be extended and permit them to have a voice in such extension. We believe that this would enable more progress to be made toward the extension of State jurisdiction in the Indian country.

The Task Force appointed by the Secretary to study the organization and programs of the Bureau of Indian affairs recommended legislation along the lines proposed here.

We recommend the following amendments to the bill:

1. On page 2, line 5, after "concerned" insert a coma and add "with the approval of the Secre-

tary of the Interior,". We believe that the Federal Government should be a necessary party to the agreement between a State and the tribe. The Federal Government has a direct interest in the subject matter.

2. On page 2, line 7, after "tribe" insert a coma and add "with the approval of the Secretary of the Interior,". The reason is the same as above.
3. On page 2, lines 8 and 9, delete "Except to the extent provided for by such consent and agreement," and substitute "The jurisdiction assumed by a State pursuant to this section shall be exclusive; with respect to any jurisdiction not assumed by a State".

The purpose of the change is to remove an ambiguity. We believe that to the extent a State assumes jurisdiction its jurisdiction should be exclusive rather than concurrent, and that with respect to any jurisdiction not assumed by the State the tribal and Federal jurisdiction should continue unimpaired. The present language of the bill is susceptible to this interpretation, but it is also susceptible to a different interpretation, which is that by agreement a State could assume concurrent jurisdiction with the tribe and the Federal Government. We believe that the latter procedure would be unwise.

4. On page 2, line 13, add a new sentence as follows: "The jurisdiction assumed by a State pursuant to this section shall be subject to the limitations specified in 18 U.S.C. 1162(b) and in 28 U.S.C. 1360(b)." These limitations apply to the States that were granted jurisdiction by name in P. L. 280 (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin), and they should apply equally to States that assume jurisdiction under this bill. The limitations relate to treaty rights,

and to the alienation, taxation, and probate of trust and restricted property.

Your attention is directed to the fact that the bill is silent with respect to the method of obtaining tribal consent and for establishing its existence. While this subject might be included in this bill, we do not regard it as essential.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

(Signed by John A. Carver, Jr.)
Assistant Secretary of the Interior

Hon. Henry M. Jackson
Chairman, Committee on
Interior and Insular Affairs
United States Senate
Washington 25, D.C.

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 27, 1968

Hon. WAYNE N. ASPINALL,
Chairman, Committee on Interior and Insular Affairs
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has requested this Department's report on two identical bills, S. 1843 which passed the Senate in December of last year and H.R. 15122, and on a similar bill, H.R. 15419.

President Johnson, in his recent message "The Forgotten American," said:

"A new Indian Rights Bill is pending in the Congress. It would protect the individual rights of Indians in such matters as freedom of speech and religion, unreasonable search and seizure, a speedy and fair trial, and the right to habeas corpus. The Senate passed an Indian Bill of Rights last year. *I urge the Congress to complete action on that Bill of Rights in the current session.*"

We recommend the enactment of S. 1843. We note that the provisions of this bill have also been incorporated into H.R. 2516 by the Senate.

Title I, which is modeled after the Bill of Rights in the United States Constitution, is in the form recommended by the Department in its report to the Senate Judiciary Committee in the 89th Congress.

Some of the constitutional provisions which pro-

tect rights and freedoms of citizens from arbitrary action by the Federal Government have been held by the courts to be inapplicable with respect to Indian tribal governments in actions which affect their tribal members. The principal decisions involve the first amendment to the Constitution, and concern religious freedom. In the cases of *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D. N.M. 1954), and *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), the courts held that the guaranty of religious freedom does not restrain local tribal governments from actions that interfere with the freedom of religious choice of their members.

Such absence of restraint on tribal governments flows from a time when Indian tribal governments were regarded as sovereign nations; when Indians were not even counted in the enumeration upon which congressional apportionment was based: and when much of what is now Indian country was unexplored wilderness. Through the 19th century the rights of citizenship were progressively applied: many Indian individuals and groups of individuals were made citizens by special Acts; and finally in 1924, by Act of Congress, all Indians not already made citizens became citizens of the United States and the States in which they resided.

Since 1924 Indian citizenship and tribal freedom from constitutional restraint have been incompatible.

Many tribes have adopted constitutions which contain provisions affording constitutional protec-

tion to their members. For example, the constitution of the Rosebud Sioux Tribe provides that its governing body shall have certain enumerated powers "subject to any limitations imposed by statute or the Constitution of the United States." There has been no judicial decision, however, holding that language is enforceable in the Federal courts.

Title I extends to the American Indian in his dealings with the Indian tribal governments basic rights and freedoms enjoyed by other citizens of the United States. These rights are specifically enumerated in the bill.

Title II directs the Secretary of the Interior to prepare and recommend to the Congress by July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations.

The Department now has a code, which is an operating code, rather than a model one. It is published in 25 C.F.R. 11. It applies only to tribes that have not adopted codes of their own, and only four tribes now use it. Two of those four are in the process of adopting their own codes. For its present use the code has been adequate. The Senate Committee's report on this portion of the bill states:

"The procedures in title 25 are outmoded, impractical, and fail to provide for an adequate administration of justice on Indian reservations. For example, under the existing code, the total number of challenges in selecting a jury, preemptory and challenges for cause, is three. Subpoenaed witnesses are paid by the

party calling them their actual traveling and living expenses incurred, if the court so direct, and the fee for jury duty remains at 50 cents a day. Questions before the court regarding the meaning of laws, treaties, or regulations are frequently referred to the superintendent for his opinion even though he is not a lawyer and lacks legal training.

"A new model code is necessary if there is to be a sensitivity to our traditional and constitutional standards in Indian courts. A code applied uniformly to all Indian courts would also assure individuals subject to their jurisdiction the same rights, privileges, and immunities under the U.S. Constitution as are guaranteed other citizens of the United States being tried in a Federal court for similar offenses."

While we might differ on the question of whether the present "operating" code is "outmoded", etc., we would agree that probably it could be improved and updated.

We now encourage each tribe to adopt a code that conforms as much as possible to the law of the State involved. Our goal is to make the Indians a part of the States in which they reside. A model code could be drafted in a manner that is consistent with that effort.

We note also that the bill calls for the development of a "model code," but it does not require the tribes to adopt all or any part of it. We believe that this is wise.

Title III, which relates to State assumption of civil or criminal jurisdiction over Indian reserva-

tions, changes the present law now embodied in section 7 of Public Law 280, 83rd Congress:

(*a*) by requiring consent of the tribe occupying the reservation before a State may assume jurisdiction;

(*b*) by making explicit an authority which we believe is now implicit—an authority to assume partial jurisdiction, or piecemeal jurisdiction, either by geographical area or by subject matter; and

(*c*) by authorizing the United States to accept a retrocession of jurisdiction from any State that acquired jurisdiction under the present provisions of Public Law 280.

The first of these changes is highly desirable. Our files are replete with resolutions and communications from many Indian groups urging this change. The change would do much to allay the fears, whether real or imagined, of the Indian people that they may be subjected to strange courts before they are ready, or before they are assured of fair and impartial treatment.

The second change is a change of form and not a change of substance, because the present law permits the States to assume partial jurisdiction either by geographic area or by subject matter. Some of the States have in fact done so. For example, Nevada has assumed jurisdiction over limited areas, Idaho has assumed jurisdiction over limited subject matter (compulsory schools, public assistance, domestic relations, mental illness, juvenile delinquency, dependent children. Washington has assumed jurisdiction over both limited areas and limited subject matter.

Inasmuch as this part of title III is a clarification rather than a change of present law, we have no objection to it.

The third change gives the United States permissive authority to accept a retrocession of jurisdiction. It does not specify the official who may exercise the permissive authority on behalf of the United States. Persumably, it would be the Secretary of the Interior.

Title IV creates a new crime of "assault resulting in serious bodily injury" within the Indian country. While we believe that the enactment of Public Laws 89-707. 80 Stat. 1100, 18 U.S.C. 1153, 3242, makes unnecessary any further legislation relating to assault within the Indian country, we do not object to this additional crime The law now covers assault with a dangerous weapon, assault with intent to commit rape, and assault with intent to kill.

Title V provides that any application for a contract or agreement relating to the employment of legal counsel requiring approval of the Secretary of the Interior or the Commissioner of Indian Affairs will automatically be in full force and effect if approval is neither granted nor denied within a period of 90 days after application for approval is filed with the Secretary.

On November 26, 1962, the Commissioner of Indian Affairs delegated authority to the Area Directors to approve tribal attorney contracts. Prompt action is now taken on proposed contracts or agreements for the employment of legal counsel by Indian tribes. When there is a delay in the approval of a con-

tract or agreement for the employment of legal counsel, it is for the purpose of an investigation pertinent to the contract or agreement, which is necessary to protect the interests of the Indians.

Practically all contracts require some changes to conform them to statutes and policies. At the present time the Area Director as his representative negotiates the necessary changes with the attorney, after which there is prompt approval. In some cases a contract is approved subject to agreement of the parties to a specified change. This procedure makes it possible for the contract to have an earlier effective date drafted, executed, and resubmitted for approval. It would be a disservice to the tribes to preclude the use of this procedure.

We believe that the present procedure is working satisfactorily, and that this title is not needed; however, we do not view it as significantly changing our present practices or procedures. We believe that we can act within the prescribed time.

Title VI directs the Secretary of the Interior to revise and extend volumes 1 and 2 of Kappler, "Indian Affairs, Laws and Treaties". The revision is to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967. The revison must be kept up to date on an annual basis.

We believe these proposals to be desirable and are prepared to carry them out.

The Bureau of the Budget has advised that the

enactment of S.1843 in its present form is in accord with the President's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

No. 77-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,
Appellants,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE

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FRANKLIN PRESS YAKIMA, WASHINGTON

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No. 77-388

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE

JURISDICTION

Jurisdiction, as claimed by Washington, will lie in this Court under 28 USC §1254(2). As specified in this section, the appeal shall be limited to federal ques-

tions presented. The Court has jurisdiction to determine if Washington met the federal requirements of Public Law 83-280 in enacting R.C.W. 37.12.010 as well as determining the Constitutional validity of R.C.W. 37.12.010. *Dandridge vs. Williams*, 397 U.S. 477 (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional treaty and statutory provisions involved in this case are:

1. Amendment 14, §1, *United States Constitution.* Washington's Brief, p. 3.

2. Article I. *United States Constitution*, Yakima's Brief, p. 36.

3. Article III, §1, *United States Constitution*, Yakima's Brief, p. 36.

4. Public Law 83-280 (67 Stat. 588). Codified as follows: Sec. 2(a) as 18 USC §1162; Sec. 4(a) as 28 USC §1360. App. pp. 32-36.

5. Public Law 90-284, Title IV (83 Stat. 73 et. seq.) Codified as 25 USC §1321(a) and §1322(a). Washington's Brief, pp. 3-4.

6. Washington Laws of 1957, Ch. 240 as amended by the Laws of 1963, Ch. 36. Codified as Chapter 37.12 R.C.W. App. pp. 37-40.

7. *Treaty with the Yakimas*, Preamble, Article II, 12 Stat. 951, 2 Kappler 524, (June 9, 1855). Appendix A of Appendices to Respondent's Brief, hereafter cited as "Yak. App." - Yak. App. A.

8. *Treaty with the Walla Walla, Cayuse, etc.*, Article 8, 12 Stat. 945, 2 Kappler 521, 524 (June 9, 1855). Yak. App. C.

9. Section 4, Enabling Act, Ch. 180 §4, Laws of 1889, 25 Stat. 676. Yak. App. D.

10. Article XXVI, *Washington State Constitution.* Yak. App. E.

11. Article XXIII, §1, *Washington State Constitution.* Yak. App. F.

12. Article I, §29, *Washington State Constitution.* Yak. App. G.

13. 18 U.S.C. §1151, Yak. App. H.

QUESTIONS PRESENTED

In noting probable jurisdiction, this Court directed the parties to address the following ultimate question:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Within that ultimate question are these involved issues:

> (1) Whether Washington's failure to amend its Constitution disclaiming jurisdiction over the Yakima Indian Reservation prior to assuming jurisdiction over the Yakima Nation and its members violates the Statutory requirements of Public Law 280.
>
> (2) Whether Washington's failure to amend its Constitution disclaiming jurisdiction over the Yakima Indians in compliance with the mandatory requirements of its Constitution violates the Equal Protection Clause of the Fourteenth Amendment.
>
> (3) Whether Washington's assumption of partial geographic and subject matter jurisdiction over the

Yakimas is in compliance with statutory requirements of Public Law 280.

(4) Whether Washington's system of partial geographic and subject matter jurisdiction over the Yakimas violates the Equal Protection Clause of the Fourteenth Amendment. This issue has three sub-issues:

(a) Whether a "suspect class" or "fundamental interest" exists making the strict scrutiny-reasonable necessity test or the rationale basis test applicable.

(b) Whether Washington's system of partial geographic and subject matter jurisdiction is in compliance with either test providing Yakimas with equal protection in compliance with the Fourteenth Amendment.

(c) Whether Washington's system of partial geographic and subject matter jurisdiction meets constitutional standards of definiteness to assure Yakimas substantial due process in compliance with the Fourteenth Amendment.

Before reaching the ultimate question and the foregoing included issues, these following threshold questions need determination by this Court:

1. Whether Congress, in the passage of Public Law 280 abrogated or modified the *Treaty with the Yakimas*, and its reserved and guaranteed rights of the Yakimas to self-government by its "own government" and its "own laws" so as to authorize Washington to assume jurisdiction over the Yakima Nation and its members.

2. Whether Congress in its passage of Public Law 280, authorized Washington to assume jurisdiction over the Yakimas without either the Yakima Nation's or the federal government's consent.

If this Court answers the foregoing questions and

issues adverse to the Yakimas, there then arises the question of whether state jurisdiction under RCW 37.12.010 is exclusive. In such an event, this Court should determine this question.

STATEMENT OF THE CASE

Appellee-Plaintiff, Yakima Nation, objects to Washington's Statement of the Case in that it omits certain pertinent facts essential to a full and accurate statement and makes unsubstantiated conclusions. The statement is strongly biased in Washington's favor.

A. The Statutory Scheme.

In considering Washington's assumption under Public Law 83-280, an outline of the summary and hurried adoption of this Act by Congress, is in order. This Act was adopted during a period in which express federal policy towards Indians sought to terminate federal responsibility for, and special relationships with, Indian tribes.[1] Individual bills were introduced early in the 83rd Congress to transfer civil and criminal jurisdiction over Indian country in the States of California, Minnesota, Nevada, Oregon and Wisconsin. The House Committee took the California bill, H.R. 1063, and turned it into a bill of general application.

[1]Congressional policy towards Indian tribes can be said to have oscillated between the view that they are conquered, but nonetheless sovereign peoples with the right to control *their own* destiny and the view that they are to be assimulated — regardless of their wishes — into the dominant culture as rapidly as possible. FINAL REPORT of THE AMERICAN INDIAN POLICY REVIEW COMMISSION, Volume I, Chapter I, (Submitted to Congress on May 17, 1977).

H.R. 1063 as amended, accomplished a transfer of jurisdiction in the five specified states.[2] The report from the Department of Interior on the bill stated that the Bureau of Indian Affairs had consulted with Indian groups in only the five named states, and Nevada and Washington. Interior noted objections from five Indian tribes including the Yakimas.[3] The tribes that requested exemption from the Act in the five named states were exempted. The House Subcommittee on Indian Affairs held a short hearing on June 29, 1953.[4] Thereafter, the House Interior Committee held a short hearing on July 15, 1953.[5] The Interior Committee issued its report on July 16, 1953.[6] On July 27, 1953, the bill was placed on the House consent calendar and was adopted without debate.[7] Two days later, on July 29, 1953, the Senate Committee on Interior and Insular Affairs reported the bill without amendment or open hearing.[8] The Senate Interior Committee Report broke no new ground and was largely a reprint of the House Committee Report. On August 1, the bill was placed on the consent calendar, taken up on the floor of the Senate and with one

[2]California, Minnesota, Nebraska, Oregon and Wisconsin.

[3]Letter from Orme Lewis, Assistant Secretary of the Interior, to Rep. Miller, Chairman of the House Committee on Interior and Insular Affairs, July 7, 1953, contained in House Report No. 848, 83rd Congress, 1st Session.

[4]Yakima App. I, pp. *1-20*. No Indian testimony solicited.

[5]Yakima App. I, pp. *21-34*. No Indian testimony solicited.

[6]H. Rept. No. 848, 83rd Congress, 1st Session (July 16, 1953).

[7]99 Cong. Rec. 9962 (July 27, 1953).

[8]S. Rept. No. 699, 83rd Congress (July 29, 1953).

amendment was passed by a voice vote.[9] This one amendment deleted Section 8, concerning the applicability of federal liquor laws to Indians in the States assuming criminal jurisdiction from the bill. Later the same day, the bill as amended by the Senate, was brought before the House on a motion to concur in the Senate Amendment. Without debate, the House concurred in the deletion of Section 8 and sent the bill to the President for his signature.[10] On August 15, 1953, President Eisenhower, although expressing "grave doubts" about parts of the bill, signed it into law:

> "I have . . . signed it because its basic purpose represents still another step in granting complete political equality to all Indians in our Nation. . . . My objection to the bill arises because of the inclusion in it of Sections 6 and 7. These sections permit other states to impose upon Indian tribes within their borders, the criminal and civil jurisdiction of the State, removing the Indians from federal jurisdiction, and in some instances, effective self-government. The failure to include in these provisions a requirement for full consultation in order to ascertain the wishes and desire of the Indians and of final federal approval, was unfortunate. I recommend, therefore, that at the earliest possible time in the next session of the Congress, the act be amended to require such consultation with the tribes prior to the enactment of legislation subjecting them to State jurisdiction, as well as approval by the Federal Government before such legislation becomes effective."[11]

[9]99 Cong. Rec. 10782-84 (August 1, 1953).

[10]99 Cong. Rec. 10928 (August 1, 1953).

[11]Statement by President Eisenhower, August 15, 1953, Reprinted in 102, Cong. Rec. 399 (January 12, 1956).

In 1955, the next session of the Washington State legislature following the enactment of Public Law 83-280, proponents of state jurisdiction over Indians introducted a bill to amend Article to amend Article XXVI of the Washington State Constitution. Article XXVI of the Washington State Constitution disclaims jurisdiction over Indian reservations. This bill failed to clear Committee and did not pass.[12]

In 1957, purportedly acting pursuant to Public Law 83-280, the Washington legislature authorized the governor to issue a proclamation assuming civil and criminal jurisdiction over any Indian reservation at the request of the Indian tribes.[13] The Yakima Indian Nation made no such request.

In 1963, the State of Washington amended its 1957 statute to provide for assumption of jurisdiction without tribal consent.[14] Under the amended statute, when a tribe consents to state jurisdiction over its reservation, the State assumed jurisdiction over "all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the State."[15] When a tribe does not consent, as the Yakima Nation did not, this

[12]1955 Washington State Senate Journal, pp. 153, 184, 1082.

[13]Laws of Washington, 1957, Ch. 240, Sec. 1.

[14]Laws of Washington, 1963, Ch. 36, App. 37-40.

[15]R.C.W. 37.12.060. App. p. 38.

1963 Act assumed full civil and criminal jurisdiction with regard to fee land, but with regard to non-fee lands, (i.e. tribal lands or allotted lands held in trust by the United States), the State assumed jurisdiction *so far as Yakima Indians were concerened*,[16] only with respect to eight categories of subject matter. These eight categories were: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon the public streets, alleys, roads and highways.[17]

In signing the 1963 bill, Washington's Governor Rosellini, in a message to the Senate, said:

> "I have signed into law with some reluctance, Senate Bill No. 56 . . .
>
> "I am aware and proud of the fact that some of the Indian tribes during the past years have vastly improved their own law enforcement agencies on their reservations. I am not unmindful of the fact that under this bill certain criminal activities by Indians might be committed on deeded lands, as distinguished from private lands, will create local law enforcement problems because it may be difficult to determine on the spur of the moment whether a given act is subject to federal, state or tribal jurisdiction.
>
> "I sincerely and deeply regret that all of the Indian tribes, since the enactment of Public Law 280 in 1953 by Congress, have not voluntarily consented to complete civil and state jurisdiction. Unfortun-

[16]R.C.W. 37.12.010 (App. p. 37), specifies that the Indians excluded from the total state jurisdiction shall be those Indians who are on *"their* tribal lands or allotted lands."

[17]R.C.W. 37.12.010 (App. p. 37).

ately, in a few areas of the state the absence of state jurisdiction over certain civil and criminal matters has caused great difficulties in enforcement and has resulted in unnecessary hardships, particularly concerning children. I have been strongly urged by many local civil and law enforcement authorities in those areas to sign this Bill. Several members of the Supreme Court in their biennial reports to me likewise have urged that the state assume complete criminal and civil jurisdiction. This is necessarily a compromise bill insofar *as it does not assume complete civil and criminal jurisdiction.*

"To the extent that this bill may conceivably be in violation of the equal protection and due process clauses of the State and Federal Constitution, I trust that those matters will be taken to court for early determination."[18] (Italics supplied).

Finding Washington's system unworkable and failing to get legislative relief, the Yakima Nation sought judicial intervention.

B. **Action of the Courts Below.**

The Yakima Nation filed this suit in the United States District Court for the Eastern District of Washington seeking a declaration that the partial assertion of state jurisdiction over its reservation was invalid and requesting an injunction against the continued exercise of such jurisdiction. The Yakima Nation contended (1) that Public Law 280 did not permit a partial assumption of jurisdiction either by geography or subject matter; and (2) that the State had failed to comply with the requirements of Public Law 280 that it amend its constitution before asserting any jurisdic-

[18] 1963 Washington State Senate Journal, p. 939.

tion over Indian lands within the State. The Yakima Nation also argued that Washington's partial assumption of jurisdiction by geography and subject matter, even if authorized by Public Law 280, violated constitutional requirements of due process and equal protection. Finally, the Yakima Nation contended that any state jurisdiction was at most concurrent with tribal jurisdiction.

The District Court denied relief. On the issue of the State's compliance with Public Law 280, the court held (J.S. App. D, p. 63) that it was bound by the decision of the Ninth Circuit in *Quinault Tribe of Indians v. Gallagher*, 386 F. 2d 648 (9th Cir. 1966), certiorari denied, 387 U.S. 907 (1967), determining that the State, without amending its constitution, could assume partial geographic and subject matter jurisdiction over Indian reservations where the tribes had the option of requesting that full jurisdiction be assumed. Though noting that Washington's jails were "inadequate," that adopted Yakima children suffered "cultural shock," "*loss of* hunting and fishing rights," "tribal membership", "support while seeking higher education" and "entitlement to share in the annual [Yakima] per capita distribution", that the handling of Indian juveniles was "less than perfect", that there was a sincere dissatisfaction over the adequacy of state law and order, that "plaintiff is representative of a

class of people historically saddled with disabilities", having been "subjected to unequal treatment and traditionally . . . politically powerless to act"; but that the right of the "plaintiff tribe to be a dependent people, protected by the federal government" was "not a fundamental right protected by the Constitution." (J.S. App. D. pp. 63, 64). Testimony showing specific acts of state: (a) brutality to Indians, (b) failure to investigate specific crimes involving Indian victims, (c) failure to respond to specific calls and (d) difference in treatment of Indian offenders (Tr. 338-445), though unexplained by Washington; was ignored by the Trial Court in its opinion. The Trial Court found there was a difference in state financing for law enforcement between city and county areas, but placed the burden of showing a non-rational basis on the Yakimas. (J.S. App. p. 65).

The Yakima Nation appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals, sitting *en banc*, adhered to its decision in *Quinault Tribe of Indians v. Gallagher*, *supra*, that Public Law 280 allowed the assumption of partial subject matter and partial geographic jurisdiction. The majority (seven judges) found that "the applicable legislative history of P.L. 280 provides reasonable support for *Quinault*" (J.S. App. C, p. 44). The majority opinion noted, however, that "Washington's checker-boarding

of criminal jurisdiction [on the Yakima Reservation] might appear particularly inefficient and that its elimination may be desirable" *(id.* at 45).

Five dissenting judges to the *en banc* majority opinion, concluded that *Quinault* should be overruled. They noted Congress' recognition that "checkerboard" jurisdiction was "antithetical to effective law enforcement" *(id.* at 53) and pointed out that even the State had agreed that "[t]he Yakimas have no effective law enforcement on their reservation" *(id.* at 54). The dissenters also relied on the legislative history of Public Law 280 and the 1968 amendments to Public Law 280, which they said indicated that partial subject matter jurisdiction had not previously been authorized *(id.* at 58).

On remand from the *en banc* court, a panel of the Court of Appeals turned to the constitutional issues and held that Washington's partial assumption of jurisdiction on the basis of "land-title classification" (i.e., full jurisdiction over fee but not over non-fee land) violated the equal protection clause of the Fourteenth Amendment (J.S. App. A 33). The unanimous panel noted that a Yakima Indian living on non-fee land was denied law enforcement protection from the State of Washington on that basis alone, while a Yakima Indian living on an adjoining parcel of fee land received protection *(ibid.)*. This discrimination, the

court held, lacked a rational basis because "[t]he state's interest in enforcing criminal law is not less 'fundamental' or 'overriding' on non-fee lands than on fee lands," and "[n]o showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement" *(id.* at 35). The Court further concluded that the unconstitutional provision was not severable from the remainder of the statute and hence that "the whole statute must be rewritten" *(id.* at 36).

On Washington's appeal from this decision, this Court has noted probable jurisdiction.

C. Applicable Facts.

Plaintiff Appellee is an Indian Nation established by Treaty with the United States explicitly and implicitly reserving in that treaty its power to be governed by "its own laws" and by "its own government."[19] The Yakima Reservation is basically a rural area having three small incorporated towns within. Members of the Yakima Indian Nation and other Indian tribes reside within both the urban and rural areas of the Yakima Indian Reservation. There are no non-Indian communities located within the exterior boundaries of the reservation.[20]

[19]See: Discussion of "Status of Yakima Nation," in this Brief.

[20]Pre-Trial Order, R 519-520. Reservation urban population: Harrah: 277 non-Indians. 28 Indians. Toppenish: 5410 non-Indians. 334 Indians. Wapato: 2590 non-Indians. 251 Indians.

Washington's conclusion regarding the stipulation contained in the Record on pages 722 to 729 at page 13 of their Brief is in error. What Exhibit A does show is that Yakima County's cost per capita for law enforcement in the amount of $4.86 per capita does not compare favorably with the statewide mean average of $7.46. The highest county per capita expenditure was Skamania with a per capita cost of $23.39 and the lowest county per capita expenditure was Jefferson County $3.69. It likewise shows that all of the cities within the State of Washington are spending many times per capita what is spent on the county level and that in Yakima County, the City of Yakima spent 640% more per capita for law enforcement then does Yakima County. It likewise shows that the number of law enforcement personnel in urban areas is much higher per capita than in rural areas and that Yakima County does not compare favorably with other selected counties. It also shows that Yakima County's clearance rates for Class I offenses is likewise not comparable with urban clearance rates or with other counties.[21]

[21]Compulations supplied. Figures taken from Exhibit A of stipulation.

Washington's contention below, as it is now at J.S. 13, is that they owe us no duty under the law to provide adequate or even average law enforcement. They contend that if the Yakimas receive law enforcement on their reservation equivalent to the worst law enforcement anywhere in the State of Washington, then this is equal protection. The Yakimas contend, that in view of the state's unilateral assumption of jurisdiction, that they must furnish to the Yakimas Indian law enforcement that is the equivalent of law enforcement furnished elsewhere in the state.

Much of the reasons for these facts is that Washington's taxing system discriminates against counties and rural areas. However, this is not the only reason. Yakima County ranks 37th out of 39 for County taxes per capita and in the year in which the trial was held, took over one million dollars of its federal revenue sharing funds which could be used for law enforcement to further reduce its low per capita tax assessment (Tr. 38, 46, 43, 85, 86).

Washington's *partial assumption* system imposes upon the Yakima Reservation a Washington law enforcement pattern that varies from tract to tract depending upon the title to the particular parcel of land, from crime to crime depending upon whether the crime was one of the categories over which Washington had assumed partial jurisdiction, and from person to person depending upon whether the violator was a member or non-member of the Yakima Nation, and from person to person depending upon whether a Yakima juvenile or adult is involved. Yakimas under this law enforcement pattern, have no effective law enforcement on their reservation. Washington acknowledges this reality (App. 41-51) as does the Court of Appeals for the Ninth Circuit (J.S. App. C., p. 54). In spite of the increase of crime on the Yakima Reservation (Tr. 221, 234), Washington's system of partial assumption of jurisdiction has resulted in the decline of both felony

and misdemeanor arrests on the rural portions of the Yakima Reservation where most of the Yakimas reside. In 1963, there were 46 felony arrests on this portion of the reservation. In 1971, Washington made two felony arrests. In 1963, there were seventeen misdemeanor arrests on that portion of the reservation; in 1971 Washington made four misdemeanor arrests. (Ex. 56, Tr. 273). Yakima County's clearance rate and amount of coverage is below national and other guidelines. Another thirty deputies would be required to meet these standards. (Tr. 124, 125). The Yakima Reservation occupies 46.4% of the land encompassed by Yakima County. Reservation residents constitute almost half of the rural population of the county and 80% of Yakima Nation's members live in this rural lower valley portion of the county. (Ex. 55, App. 52, Tr. 273). No Yakima County Sheriff's office or Washington State Patrol office exists on the reservation. The promised toll free system to contact a sheriff's office has not been provided.[22] Of the 29 deputy sheriffs assigned to work in the field at the time of trial, only two were assigned to reservation patrol. (J. S. App. C, p. 54). The Yakima County Sheriff and Director of County Juvenile Department have said that Washington cannot do a good job with juveniles when it has no jurisdiction over

[22]This sentence is outside of the record, but made necessary by the Trial Court's reliance on Washington's promise that one would be provided.

parents and the sheriff has stated that fragmented jurisdiction has hampered police work in other law enforcement areas as well. (J. S. App. C, p. 54, Tr. 123, 124, 139, 167, 168, 174-176). Yakima County's Juvenile Director has stated that there are more resources made available by Washington to deal with white children then there are to deal with Indian children. (Tr. 172). Juvenile officers have no training about Indian culture. (Tr. 196). The Yakima County Prosecutor testified that the Washington assumption statute was confusing and different prosecutors interpreted the Act in different ways (Tr. 212). Deputy Sheriff, Del Young, who had worked the reservation before and after the Washington assumption statute said that there was no change in the sheriff's office to take care of the added burden after state assumption (Tr. 215). Though the Sheriff tried to tie the Reservation Patrol in with the Sunnyside Office, Deputy Young testified that he had not been in the Sunnyside Office for over a year. (Tr. 215). It could not be remembered by those who were familiar with reservation enforcement when Deputy Sheriff Young made an arrest. In contrast, the Yakima Indian Nation was expending over twice per capita for law enforcement on the Yakima Reservation for the Indians and non-Indians population and almost sixteen times more for its own citizens on the Reservation as Yakima County was spending for its citizens

within Yakima County.[23] Washington law enforcement officers classified the Yakima Nation's law enforcement branch as an excellent department. (Tr. 230).

It was clear throughout the testimony that the Yakima Nation wished to have the jurisdictional situation straightened out so it could provide good law and order on the Reservation which the State of Washington was unwilling or unable to do.

Washington cannot disregard this overall situation by excerpting certain individual statements. The Yakimas do not dispute that its law enforcement officers have done everything they can to make the present system work and have cooperated very well with state officers. However, as the record shows, and as an expert testified; this system of partial geographic and subject matter assumption will just not work no matter how much cooperation the Yakima Nation is willing to give. (Tr. 307-316).

D. Situation if R.C.W. 37.12.010 Void.

Washington has taken several pages (19-27) of its brief to discuss the effect of striking down R.C.W. 37.12.010, on crimes committed within the exterior boundaries of the Yakima Reservation. A short discussion is in order.

Under 18 USC §1151, and 18 USC §1152, federal enclave criminal jurisdiction covering all general crimi-

[23]See Note 21.

nal laws of the United States and under the Assimiulative Crimes Act (18 USC §13), — the criminal laws of the State of Washington — to all crimes, where an Indian or his property is involved. Excepted from these general laws are crimes where *no* Indian or his property is involved *(United States v. McBratney,* 104 U.S. 621 (1882) and minor crimes where *only* Indians and their property are involved and the Indian "has been punished by the local law of the tribe." For major crime listed in the Major Crimes Act, 18 USC §1153, an Indian violator would be liable regardless of who the victim was.

It would appear that this Court has held in *McBratney, Supra,* and *Draper vs. United States,* 164 U.S. 240 (1896) that Washington — exclusive of RCW 37.12.010 — has jurisdiction over non-Indian crimes. However, these problems are not now before this Court for determination. This action was brought to declare that R.C.W. 37.12.010 does not affect members of the Yakima Nation.

In any event, if this Court upholds the Court of Appeals in striking down RCW 37.12.010, it will enable Washington tribes, in cooperation with Washington and the United States, to fashion an adequate law enforcement system — pursuant to 25 USC §1321(a) — on the Yakima Reservation.

E. **Status of Yakima Indian Nation.**

The Confederated Tribes and Bands of the Yakima

Indian Nation is an Indian Nation established by Treaty with the United States of America in 1855 and has a government duly recognized by the Secretary of Interior.[24] Among the rights that have been guaranteed and reserved to this signatory Indian tribe is the right to control its internal affairs within the Yakima Indian Reservation through an Indian government. The treaty reservation and guarantee of these rights is *explicit.*

The Yakimas were *explicitly* guaranteed that they were to have "their own government" and were to have "their own laws."[25] Other treaties signed the same day as the Treaty with the Yakimas provide for submission to the laws of the United States but Article VII of the *Treaty with the Yakimas* merely acknowledges dependency and does not provide for submission to the laws of the United States.[26] The Yakima Treaty together with its legislative history in the Treaty Minutes which are to be read in interpreting the Yakima Treaty;

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[24] *Treaty with the Yakimas,* Yak App. A; R. 486.

[25] See: Record of the Official Proceedings at the Council in the Walla Walla Valley (June 9 and 11, 1855) Yak. App. B and hereinafter referred to in this Brief as "Treaty minutes." Excerpts of these treaty minutes pertaining to this footnote are discussed later in this Brief at p. .....

[26] Comparing Article 8, *Treaty with the Walla Walla, Cayuse, etc.,* Yak. App. C with Article VIII of the *Treaty with the Yakimas,* Yak. App. A, p. A2. Also see: *Worcester v. Georgia,* 6 Pet. 515 (1832):

> "[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state."

clearly provides that the Yakimas were to be *exclusively* governed by their own laws. At that treaty council, Governor Stevens, United States Treaty Commissioner, after describing how he wished to separate the Yakimas to an area exclusive for their use to protect them from the white man said:

> "Let us go back to old times across the mountains and see what was there done. The Red Man received the white man gladly; but after awhile difficulties arose; the blood of the red man was spilled and the blood of the white man; there was cold, there was hunger; there was death. But a man came, William Penn, and said: I will see if my white children and my red children cannot be friends and they were friends. William Penn and the Indians came together as we now come together, they made a treaty, there was peace, no white man's blood and no red man's blood has been shed, and there has been peace to this day; this was in olden times."

Oh! These people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were few whites, did not work well where there were many. It was found that when the white man and the red man lived together on the same ground, the white man got the advantage and the red man passed away.

The Great Father's name at that time was Andrew Jackson; he said "I will take the red man across the river into a fine country where I can take care of them; they have been there twenty years; they have *their own government*, they have their own schools, *they have their own laws*, their Chief John Ross knows as much as my brother or myself and a great deal more; he is what you call a lawyer; he is an Indian, a Cherokee. When he goes to see the Great Father, the President, he sits with him at a table as you sit with us at table.

> Before you met my brother and myself and council, you *have your own council;* and the great white father when he acts has his council also, he has his chiefs.
>
> When I saw the Great Father, he called his chiefs together and had a council about you. He has two chiefs who have care of the red man, their names are Gen'l Orr and Robert Johnson, and I want you to remember them. Robert Johnson lives near John Ross; they both told me that *what has been done for John Ross should be done for you,* and more as I will tell you."[27]

The *Treaty with the Yakimas* clearly states that the signatory fourteen tribes and bands "for the purposes of this *treaty,* are to be considered as one *nation.*"[28]

In *Worcester v. Georgia,* 6 Pet 515 (1832), Chief Justice Marshall explained the legal affect the use of the terms "treaty" and "Nation":

> "The term "Nation" so generally applied to them means a "people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "Nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. *They are applied to all in the same sense.*" (Italics supplied). 6 Pet. 559-560.

This was the law of the land at the time of the

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[27]Yak. App. B, p. 1-3.

[28]Yak. App. A, p. 1. Emphasis supplied.

execution and ratification of the *Treaty with the Yakimas* and explicitly establishes the sovereignty of the Yakima Indian Nation—except as limited by the terms of the Yakima treaty.

Article II of the *Treaty with the Yakimas* provides that the Yakima Indian Reservation is to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel was to enter the reserved area without the permission of the Yakimas and the United States.[29] This Court, in *Williams v. Lee*, 358 U.S. 217 221 (1958), explained the legal affect of that language:

> "[I]n return for [Indian] promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one, except United States government personnel, was to enter the reserved area. *Implicit* in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists."

This implicit right of self-government that flows from this portion of a treaty was reaffirmed and expanded in 1972 by this court in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 173-175 and recently in *United States v. Wheeler*, ___ U.S. ___ 46 L.W. 4243, (Opinion March 26, 1978). These cases also make it clear that the Yakimas right of self-government *con-*

[29]Yak. App. A, p. 1.....

tinues to exist until *lawfully* abrogated or modified by Congress.

SUMMARY OF ARGUMENT

This Court has made it clear that a treaty reserved or guaranteed right continues to exist until clearly abrogated or modified by Congress. The presumption is against abrogation or modification. The explicit and implicit Treaty reserved and guaranteed rights of the Yakimas to self-government was not changed by Congress in the enactment of Public Law 83-280. Congress did not include objecting tribes in the five named states, and intended to exclude the Yakimas. Public Law 280 does not meet the necessary standards of abrogation and modification, established by *Menominee v. United States*, 391 U.S. 404 (1968). Under, *Delaware Tribal Business Committee v. Weeks*, 429 U.S. ___, 97 S. Ct. 911, (1977), this action of Congress is reviewable. Inclusion of the Yakimas in Public Law 83-280, and authorizing Washington to assume jurisdiction over the Yakimas without complying with the mandatory requirements of its Constitution, and without establishing a system that would provide protection to the Yakimas, would violate the Fifth Amendment. Congress did not intend such an unconstitutional result.

Washington's assumption of jurisdiction without amending its constitutional disclaimer of jurisdiction over Indians does not meet the statutory requirements

of Public Law 83-280 or the due process requirements of the Fourteenth Amendment. The proviso in Section 6, Public Law 83-280, applicable to Washington, on its face provides that state assumption under Public Law 83-280, "shall not become effective", "until the *people*" [Washington's electorate] "have appropriately amended their state Constitution." Likewise, Public Law 83-280's legislative history, evidenced by (a) Subcommittee hearings, (b) Committee hearings, (c) Departmental reports, (d) Committee reports, (e) Statements on the Senate floor; clearly demonstrate that Congress believed that the Amendment of Article XXVI, of Washington State's Constitution disclaiming jurisdiction over reservations was necessary prior to Washington's assumption of jurisdiction. Washington did not amend Article XXVI, which is a mandatory article of its Constitution, and purported to assume jurisdiction over the Yakimas without the consent of "the people" by a mere legislative act that did not refer to Washington's constitutional disclaimer. Washington's failure to remove its constitutional disclaimer before assuming Indian jurisdiction under R.C.W. 37.12.010 violates the statutory requirements of Public Law 83-280 and the due process requirements of the Fourteenth Amendment. *Kennerly v. District Court*, 400 U.S. 423, (1971) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

Washington's partial geographic and subject matter assumption does not meet the statutory requirements of Public Law 83-280. Section 2a and 4a of Public Law 83-280, provides that state jurisdiction assumed under the Act shall be exercised "to the same extent" and have the "same force and effect within Indian country as they have elsewhere" in Washinton. Public Law 83-280, was an amendment referenced to the portion of the United States Code, containing 18 U.S.C. §1151. Section 1151 provides that "Indian country" shall be the entire reservation "notwithstanding the issuance of any patent." Washington in its unilateral assumption limited its exercise of jurisdiction over Indians to less than all Indians, to a limited extent, force and effect and excluded patented land from "Indian country" creating a congressionally unfavored "checkerboard" system with unequal and unclear protection. Likewise, Public Law 83-280's legislative history evidenced by committee hearings, previous legislation and subsequent legislation, demonstrates that "Indian country" as previously defined and total state assumption were the required perimeters of permissible state assumption. Washington's partial geographic and subject matter assumption is not in compliance with the statutory requirements of Public Law 83-280. *Kennerly, supra, Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Superintendent*, 381 U.S. 351 (1962).

Washington's partial geographic and subject matter assumption system violates the Equal Protection Clause of the Fourteenth Amendment. The Circuit Court held that Washington's partial assumption based on land title classification "fails to meet any formulation of the rational basis test." The Court of Appeals therefore, found it unnecessary to determine if under a two-tier test, strict scrutiny was required. However, as Yakima Indians in this case are a "suspect class" and have the "fundamental right" of self-government and protection involved; strict scrutiny is required. Washington's R.C.W. 37.12.010 meets neither test. Since the declared and permissible purpose of the legislation permitting and assuming jurisdiction over the Yakimas is the protection of the person, property and liberty of these Yakimas, any legislative purpose that is not reasonably necessary or does not have as its rational basis the satisfaction of this purpose; violates the Equal Protection Clause of the Fourteenth Amendment. Washington's alleged purpose cannot satisfy either the reasonable necessity test or the rational basis test, and violates the Equal Protection Clause of the Fourteenth Amendment. *Massachusetts Board of Retirement v. Muguria*, 427 U.S. 307 (1976), *Delaware Tribal Business Committee v. Weeks*, ___ U.S. ___, 97 S. Ct. 911 (1977), *Bryan v. Itasca County*, ___ U.S. ___, 97 S. Ct. 2102 (1976).

Likewise, in its partial assumption of subject matter, Washington by its mere recitation of eight categories without further definition or reference, does not meet the standards of definiteness required by the Fourteenth Amendment. R.C.W. 37.12.010 violates this Court's requirements of adequate notice and non-discretionary standards required by the Fourteenth Amendment. *Connolly v. General Construction Co.*, 269 U.S. 385 (1926) and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Respondents conclude that R.C.W. 37.12.010 does not separately — or at least cumulatively — meet the statutory requirements or required purpose of Public Law 83-280 or the Equal Protection Clause of the Fourteenth Amendment.

If this Court does not so conclude, we call to this Court's attention that the question of whether Public Law 83-280 is exclusive or concurrent remains to be determined. It was not necessary for the Court of Appeals to reach this question raised by Respondent below. Alternatively, this question should be determined by this Court. Public Law 83-280 and R.C.W. 37.12.010 do not negate existing sovereignty and jurisdiction of the Yakima Nation. *United States v. Wheeler*, ___ U.S. ___, 46 L.W. 4243 (1978).

ARGUMENT

I. YAKIMAS NOT WITHIN PURVIEW OF R.C.W.

37.12.010, AS CONGRESS DID NOT ABROGATE YAKIMAS EXCLUSIVE TREATY RIGHT OF SELF-GOVERNMENT BY PUBLIC LAW 83-280.

This Court has consistently recognized that treaties with Indian Tribes bind the United States[30] and preclude state action that violates treaty provisions.[31] While we are here involved in attempted state incursions upon treaty rights of self-government, the state is basing its primary authority on the delegation of permission for this intrusion on Public Law 280. Therefore, an initial discussion of whether this Congressional intrusion of Public Law 83-280 meets the guidelines of this Court, is in order. If Public Law 83-280 does not meet these guidelines, R.C.W. 37.12.010 does not affect the Yakimas and this Court should so declare.

We do not here argue that the existence of a treaty right, whether express or implied, imposes an absolute bar to Congressional action in violation of that right. We do, however, raise the questions as to whether the Congressional intent that must be manifested in the enactment of Public Law 280 supports a finding of abrogation of this fundamental treaty right of the Yakimas without their consent.

Although the quantum of Congressional intent that

[30]*Squire v. Capoeman,* 351 U.S. 1, 6 (1956). See also: *United States v. White,* 508 F. 2d 453 (8th Cir. 1974).

[31]*Menominee Tribe v. United States,* 391 U.S. 407 (1968). See also: *United States v. Washington,* 520 F. 2d 696 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

must be manifested in a statute or its legislative history to support a finding of abrogation has not been uniformly defined, this Court has set up a heavy presumption against abrogation.[32] In fact, in the past fifty years[33] this Court has not found an Indian treaty to have been abrogated by less then express language. In the leading case of *Menominee Tribe v. United States,* 391 U.S. 404 (1968), this Court considered whether a congressional act terminating federal supervision over an Indian tribe abrogated the hunting and fishing rights previously guaranteed by treaty so as to permit state intrusion. Despite the seemingly unequivical language of the Act that after termination of the reservation "the laws of several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,"[34] this Court noted that the Act did not explicitly terminate treaty rights[35] and declined to construe the Act as "a backhanded way" of achieving the result.

[32]This Court uses various expressions to describe this presumption against abrogation. This Court recently has shown a preference for the formulation that abrogation will be found "only upon a clear showing" of Congressional intent. *DeCoteau v. District Court,* 420 U.S. 425, 440 (1975); *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). This Court has also said that abrogation shall not be lightly implied. *Squire v. Capoeman,* 351 U.S. 1, 8 (1956). See also: *Kimbel v. Callahan,* 493 F. 2d 564, 568 (9th Cir. 1974, cert. denied, 419 U.S. 1019 (1974).

[33]Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows Upon the Earth — How Long A Time Is That?"* 63 Calif. L. Rev. 601, 630.

[34]391 U.S. at 410.

[35]391 U.S. at 408.

Recently, the Court of Appeals for the Eighth Circuit interpreted the *Menominee* rule in the case of *United States v. White*, 508 F. 2d 453 (1974). The Eighth Circuit considered whether the Bald Eagle Protection Act had impliedly repealed a treaty right to hunt. The court concluded that:

> "[T]o affect those rights [by statute], it was incumbent upon Congress to *expressly* abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their native Reservations." (Italics supplied).

Finding no discussion in the Act's legislative history of the intended affect of this act on those specific treaty rights, the Eight Circuit held that the treaty rights had not been modified.

There is nothing in Public Law 83-280 and its legislative history that shows that Congress considered the specific treaty rights of the Yakima Indian Nation and intended to abrogate that specific treaty right. The contrary is true. Congress intended to exclude the Yakimas. All other objecting tribes were excluded, but since the Yakimas came from other than a listed state, no exclusion was written into the bill in the hurried drafting of Public Law 83-280. This will be further discussed at p. 35 herein.

At this time when this Nation is declaring its concern for human rights and self-determination throughout the world, and the expressions of the Executive

Branch and Congress support self-determination by Indian tribes, it would be appropriate for this court to clarify its *Menominee* rule by announcing that, since neither Public Law 83-280 nor its legislative history support an intention to effect specific Yakima treaty rights; that these Yakima treaty rights of self-government will not be modified or abrogated by this Act.

Likewise, Public Law 83-280 and its protegny R.C.W. 37.12.010 does not satisfy the constitutional duty of Congress to provide due process and equal protection to the Yakimas. The presumption is that Congress would not take such unconstitutional action.[36] This Court has recently made it clear in *Delaware Tribal Business Committee v. Weeks*, 429 U.S. ___ 97 S. Ct. 911 (1977); that the existence of plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is immune from judicial scrutiny to determine whether due process or equal protection has been provided to the Indians involved.

> "The statement in *Lonewolf*, [citation omitted] that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the court of congressional power to abrogate treaties [citation omitted], has not detered this court, particularly in this day, from scrutinizing Indian legislation to

[36]If the state is required to follow the explicit wording of the statute, such a constitutional confrontation is avoided.

> determine whether it violates the equal protection component of the Fifth Amendment. [citations omitted]. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' "
>
> "The standard of review most recently expressed is that the legislative judgment should not be disturbed as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians." (97 Sup. Ct. at 918-919).

In *Weeks*, there was no "suspect class" as only "Indians" were involved. Likewise, no contention was made that there were any "fundamental interests" involved. Therefore, the majority was limited to the rational basis test in determining the constitutionality of distribution of judgment funds by Congress, saying that Congressional Acts, must be "tied rationally to the fulfillment of Congress' unique obligation towards Indians."[37] This Court has made it clear that the fulfillment of Congress' unique constitutional obligation towards Indians in the area of criminal jurisdiction is to protect them from others and from their own improvidence.[38] It is this protection of Indians upon which this particular power of Congress to legislate depends.[39]

[37]The concurring opinion appears to base its holding on the distribution being *reasonably necessary* to fulfill this congressional obligation. Judge Stewart's dissent is based upon his conclusion that Congress had failed to meet even the rational basis test.

[38]*United States v. Kagama,* 118 U.S. 372 (1903). This holding is still relied upon by this Court as late as *United States v. Wheeler,* ..... U.S. ....., 46 L. Week, (Opinion March 26, 1978).

[39]*Kagama, supra,* where this Court held that the power of Congress to legislate in this field wasn't the commerce power but that Congress' power rested *solely* on the *necessity* to *protect* Indians.

Since Congress made no showing of necessity of enacting Public Law 83-280 to protect the Yakimas, this Act does not possess a foundation to constitutionally sustain its authorization of Washington's unworkable system contained in R.C.W. 37.12.010. The hearings show that it was intended that the Yakimas be excluded.[40]

The corollary of this power of Congress to legislate to protect Indians is the duty of Congress to protect Indians. This duty of protection is a "fundamental right" of the Yakima Nation and its members.[41] The evidence is clear and convincing, that if Congress in adopting Public Law 83-280 authorized the system of law enforcement adopted by the State of Washington on the Yakima Reservation; Public Law 83-280 did not meet constitutional standards of equal protection and due process. Presumptively, Congress did not intend that result.[42]

Further, we have raised the question as to whether Congress can delegate to states the legislative and judicial power over Indians — where this legislative and judicial power is based upon the duty of the United States to protect Indians. The Legislative power of Congress is contained in Article I of The Constitution;

[40]Yak. App. I, p. *13.* Congress excluded every tribe that objected. However, since the Yakimas and the Colvilles were not from a listed state, during the hurried drafting of the Bill, they were not so excluded.

[41]We argue herein that the Yakimas are entitled to strict scrutiny because a "suspect class" and a "fundamental right" in involved. See pp.

[42]*Wright vs. Vinton Branch Bank,* 300 U.S. 440, 461 (1936).

"All legislative power herein granted *shall be vested* in a Congress of the United States, which shall consist of a Senate and a House of Representatives. (Emphasis supplied).

The judicial power of the United States is contained in Article III, Section 1;

"The judicial power of the United States shall be *vested* in one Supreme Court and such inferior courts as the Congress may from time ordain and establish. . . ." (Emphasis supplied).

By the passage of Public Law 83-280, Congress purported to delegate "vested" federal legislative and judicial function, based on the duty of the United States to provide internal protection for the Indian people, to the States without the consent of the governing body of the tribes involved. This Court has pointed out in *United States v. Kagama*, 118 U.S. 375 (1903), that Congress' power to legislate regarding internal affairs by Indian tribes is limited to that conferred by the Commerce Clause and by the federal duty to provide protection to Indians. In *Kagama*, this Court found that the protection of Indians constituted an *exclusive* national problem and referred to the practical necessity of withholding such power from the states:

"It seems to us that this [protection of Indians] is within the competency of Congress. These Indian Tribes are wards of the nation. They are communities dependent upon the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the State where they

are found are often their deadliest enemies. From this very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.*" (Emphasis supplied).

It is conclusively demonstrated by this record, that this ill feeling and failure of the states to provide protection for Indians still exists. There is and can be no showing of the power of Congress to delegate this exclusive federal power to Washington.

Even if Congress could delegate to Washington this federal, judicial and legislative power, which is based on the duty to protect, and even if the Congress of the United States authorized Washington to assume this federal, legislative and judicial power without amending Article XXVI of the Washington State Constitution which disclaims this legislative and judicial power over Indian lands; such action would not meet the constitutional standards of due process of law. The Washington State Constitution and the Enabling Act by which the State of Washington became a member of the Union expressly disclaims jurisdiction over Indian lands.[43] Though proponents of state jurisdiction did attempt to remove this constitutional disclaimer[44] this action failed to even get the necessary legislative ap-

[43] *Washington Constitution*, Article XXVI, Yak. App. E. Enabling Act. Yak. App. D.

[44] 1955 Washington State Senate Journal, pp. 143, 184, 1082.

proval[45] and was not submitted to the people for approval as the Washington State Constitution requires.[46] The Washington State Constitution requirement that an amendment to the Constitution be passed by two-thirds of the legislature and be submitted to the people for majority vote is mandatory.[47]

If the Constitutional requirements of due process of law are to be satisfied, the Yakima Nation is entitled to the procedural safeguards against the unwarranted and unwise assumption of state jurisdiction over the Indian people on the Yakima Indian Reservation, by having this matter submitted to a two-thirds vote by the legislature and thereafter be submitted to the people of the State of Washington for their decision as required by the Washington State Constitution.

This Court has held that procedural safeguards must be satisfied to accord the constitutional standards of due process of law and this rule is applicable here.[48]

Again, it must be presumed that Congress did not authorize this unconstitutional action.[49]

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[45]Id.

[46]*Washington Constitution,* Article XXIII, Yak. App. F.

[47]*Washington Constitution,* Article I, Section 29. Yak. App. G.

[48]To your writer, it is fundamental that mandatory provisions of a constitution cannot be abrogated without amending a Constitution. It is likewise, as fundamental, that legislatures cannot abrogate the right of the people to vote on constitutional changes. Such principles are protected by this Court under the Fourteenth Amendment. *Duncan vs. Louisiana,* 391 U.S. 145 (1968).

[49]See notes 36, 48.

II.

THE STATE OF WASHINGTON HAS NOT COMPLIED WITH THE STATUTORY REQUIREMENTS OF PUBLIC LAW 83-280 IN ITS EXERCISE OF JURISDICTION

A. Failure to amend the disclaimer portion of Washington's Constitution.

The Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 676), providing for the admission of the State of Washington, (among other states) to the Union; provided in Section 4 that Indian lands in the State of Washington should remain under the absolute control of the Congress of the United States. In Section 4, Congress expressed its will that the people themselves, not their representatives, should be the ones that made the determination regarding the matters contained in this section, stating "[a]nd said conventions shall provide, by ordinances irrevocable without the consent of . . . the people of said states: . . . That the people do agree and declare . . . [that] said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." Under this explicit mandate of the congressional Enabling Act, the people of Washington, through constitutional convention, incorporated this disclaimer of jurisdiction over Indian reservations into Article XXVI of the Washington State Constitution and provided it should be irrevoc-

able without the consent of the United States and *the people* of the State of Washington.[50]

Purporting to act in compliance with P. L. 83-280, Washington's 1963 Legislature unilaterally and over the strenuous objections of the Yakima Nation, assumed partial geographic and subject matter jurisdiction over the Yakima Indian Reservation.[51] Proponents of state jurisdiction had previously unsuccessfully sought to amend article XXVI to take jurisdiction over Indian Reservations. In 1963 these proponents followed a more expedient method, ignored the constitutional disclaimer and purported to assume this unilateral partial jurisdiction by mere legislative enactment. The Governor of the State of Washington raised the question as to whether this was constitutional, but signed the law asking that an early judicial determination of this question be obtained.[52] As pointed out by Washington, the majority of the Supreme Court of the State of Washington has made the determination that the Washington State Legislature can amend a mandatory, irrevocable portion of the Washington State Constitution without the consent "of the people," by mere legislative act. They ignored the mandatory amendment procedures of the Washington State Constitution and

[50]This language is taken from the dissenting opinion in *Tonasket v. Washington*, 84 Wn. 2d 192, 525 P. 2d 217.

[51]Chapter 36, Laws of 1963. Codified as RCW 37.12.010 et seq. App. 37-40.

[52]Infra, p. 9.

held the consent of the people of the state could be furnished by the legislature.[53]

Erroneous as this unusual interpretation of constitutional amending procedures may be, this Court's review is limited. This Court has the limited duty to determine whether Washington, in adopting its partial geographic and subject matter jurisdiction — without amendment of Washington's Disclaimer Clause — violated the statutory requirements of Public Law 83-280, Due Process or the Equal Protection Clause of the Fourteenth Amendment.

Washington, apparently recognizing the weakness of their position, did not deem it appropriate to fully brief this issue.

However, like the Solicitor General, we believe this substantial question warrants plenary consideration by this Court.[54] Washington's failure to amend the disclaimer clause in its Constitution, violates both the statutory requirements of Public Law 83-280 and the Equal Protection Clause of the Fourteenth Amendment. This is a threshold issue to the question of whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 83-280, violates either the statutory requirements of Public Law 83-280 or the Equal Protection Clause of

[53]Washington's Brief, p. 30.

[54]Memorandum of United States, p. 9.

the Fourteenth Amendment. Violation of either federal requirement in total assumption by Washington would violate the same federal requirement in Washington's included partial geographic and subject matter assumption. This Court has held that a prevailing party may assert such grounds even though they were not relied upon by the Court below. *Dandridge v. Williams*, 397 U.S. 477 (1970).

State jurisdiction can only be validly asserted on the Yakima Reservation by leave of the United States. *Antoine v. Washington*, 420 U.S. 194, 205 (1975). Washington relies on Public Law 83-280 for such permission. Section 6 of Public Law 83-280 explicitly requires that Washington amend its constitution before assuming jurisdiction over Indian Reservations:

> "Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their constitution or statutes as the case may be."

This Court has not specifically considered the necessity for constitutional amendment by Washington, but it has considered the necessity of state compliance with Public Law 83-280 requirements, as amended, in *Kennerly vs. District Court*, 400 U.S. 423, (1971) and *McClanahan vs. Arizona Tax Commission*, 411 U.S. 164 (1973).

In *Kennerly*, this Court held that the "*procedures*"[55]

[55]400 U.S. at 429.

(this Court's emphasis) in Public Law 83-280, must be strictly followed before a state can assume jurisdiction. In *Kennerly*, notwithstanding the approval of the highest court of the applicable state *and* tribal approval; this Court held that actions of the state and tribe involved did not comport with the explicit requirements of Public Law 83-280.

McClanahan reasons that Public Law 83-280 expressly provides that the state may only assume state jurisdiction by removing its constitutional disclaimer.[56] To those who would argue that the states can assume jurisdiction over Indian country by simple legislative enactment, this Court said at 411 U.S. 177-78:

> "But we cannot believe that Congress would have required the consent of the Indians affected *and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the states were free to accomplish the same goal unilaterally by simple legislative enactment.*" (Citing *Kennerly*. Emphasis added).

Both *Kennerly* and *McClanahan*, in which the validity of state jurisdiction had been upheld in state courts under state law, make it abundantly clear that the question of validity of state assumption of jurisdiction

[56]Though *McClanahan* was interpreting Public Law 90-284, it is controlling here. While Section 7 of Public Law 83-280 was repealed by Section 403(b) Public Law 90-284, the requirement of Section 6 regarding necessity for amending a constitutional disclaimer was retained in Section 404 of Public Law 90-284. This is probably an appropriate time to discuss Washington's peripheral claim that since there was a savings clause in Public Law 90-284 as regards Section 7, that this would ratify Washington's assumption. It is clear that it does not because Washington's assumption was under Section 6 of Public Law 83-280.

over Indians and Indian reservations is a federal question to be determined as a matter of federal law. They likewise determine, that under Public Law 83-280, a mere legislative enactment will not suffice where a state constitution contains a constitutional disclaimer of jurisdiction. These cases are controlling.

This question of assumption and the proper assumption of this delegation is dependent upon the proper *federal* interpretation of Public Law 83-280, a Federal Act. See: *Bryan vs. Itasca County*, ___ U.S. ___ 97 Sup. Ct. 2102 (1976); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944).

The conclusion of Washington's Supreme Courts in *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744; *Comenout vs. Burdman*, 84 Wn. 2d, 192, 525 P.2d 217; *Makah Indian Tribe v. State*, 76 Wn. 2d 485, P.2d 590 (1969), and *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33 (1959), that legislative assumption of Indian jurisdiction was valid under state law, is not controlling. The Circuit Court of Appeals for the Ninth Circuit reliance on the State interpretation in *Quinault Tribe of Indians vs. Gallagher*, 368 F.2d 648 (1966) and *Dixon vs. Rhay*, 396 F.2d 760 (9th Cir. 1968), is in error. The triggering event for state assumption specified by Congress is amendment of the state constitution, and that *explicit federal statutory* requirement transcends any state interpretation.

The plain reading of the Proviso in Section 6 of Public Law 83-280 requires the Amendment of Article XXVI of the Washington State Constitution to meet the statutory requirements of the Act. Should this Court believe that ambiguity exists, an outline of this Court's rules regarding interpretation of Public Law 83-280 is in order."

In interpreting Public Law 83-280, this Court "must be guided by that eminently sound and vital cannon, that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan vs. Itasca County*, 426 U.S. 373 (1976).

"[T]he primary concern of Congress in enacting Public Law 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian Reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan*, supra.

In its interpretation, this Court relies on Congressional discussion, *(Bryan*, supra; *United States v. CIO*, 335 U.S. 106 (1948); Reports of Legislative Committees, *(Bryan*, supra; *Harrison vs. Northern Trust*, 317 U.S. 476 (1943); legal opinions prepared for the sponsors and congressional committees, *Helvering vs. Grif-*

[57]In addition to the rule that the face of the statute will control is the rule that the face of the statute is still the foremost guide to legislative intention even when it is not conclusive. *United States v. Oregon*, 366 U.S. 643, 648 (1961). *Schwegmann Bros. vs. Calvert Distillers, Corp.*, 341 U.S. 384, 390-5, (1951).

fiths, 318 U.S. 371 (1943). Congress' concern about the continuing vitality of tribal governments. *(Bryan*, supra), and subsequent treatment by Congress. *(Mattz vs. Arnett*, 411 U.S. 481 (1975).

With this Court's applicable rules of statutory construction firmly in mind, we now examine the legislative history of Public Law 83-280.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped Public Law 83-280 is available to provide this Court with the rapid and summary step by step evolution of the Act. These hearings were filed by the United States in *Tonasket vs. Washington*, 411 U.S. 451 (1973) and for the Court's convenience are reproduced in Appendix I to this brief.[58]

The evolution of §6 and §7 of Public Law 83-280 can best be ascertained from the informed congressional discussion in the July 15, 1953 Hearing of the Senate Committee on Insular and Interior Affairs. Mr. Abbott, Counsel to the committe, first stated:

" . . . The bill does not, as acted upon by committee make provision for eight states which have constitu-

[58]These Hearings are cited herein as "July 15, 1953 Committee Hearings on HR 1063" and "June 29, 1953 Sub-Committee Hearings on HR 1063.

Considering the importance of this legislation to treaty reserved rights of self-government, the shortness of time involved in these hearings is shocking. However, the House outdid the Senate. The Senate merely adopted the House Report and moved the House's Bill within five days from House passage. Certainly not a very good record for a body who classifies itself as a "great deliberative body."

tional organic impediments for accepting state jurisdiction. The Enabling Act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and *Washington* provided that *exclusive* Federal jurisdiction would be retained.

"The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction"

. . .

"I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments *by action of the people in the state*, they could then take over the exclusive civil criminal jurisdiction over Indians and Indian matters.

"*In addition, Mr. Westland's state* [*Washington*], which *is one state which has a constitutional impediment, the one section provides for removal by the state of constitutiona' impediments.* The other section would apply to any other of the 15 Indian states, so that they, by affirmative legislative action, could assume either criminal or civil jurisdiction, or both, at such time as the matter were laid before the legislative bodies.

"In short, the legislation as acted upon by the *committee would apply to only five states.* The two additional section amendments would apply *first to the eight states having constitutional or organic law impediments* and would grant consent of the United States for *them to remove such impediments* and thus acquire jurisdiction.

"The *other amendment* [Section 7] would apply to *any other* Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." (Emphasis supplied). July

15, 1953 Committee Hearing on H. R. 1063, folio 2-4, Yak. App. I, pp. 22-24.

So it can be seen that in order to allow the bill to operate nationwide, the legal analysts who drafted the bill recognized that two different amendments would have to be made to provide for differing legal problems in two distinct sets of optional states.

The two amendments with sharply contrasting language must be studied carefully.

> "Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> "Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Public Law 83-280, 67 Stat. 588 at 590).

Mr. Abbott's bald statement that §6 and not §7 governs Washington, makes Congress' intent very clear. But the matter does not end there. The conclusion is bol-

stered in the Senate and House Committee Reports on H. R. 1063 which read in part:

> "Your committee has amended the printed bill by adopting substitute language which operates to —
>
> . . .
>
> "(2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and *Washington. Effect of the disclaimer* of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, *proceed to amendment of their respective organic laws by proper amending procedure.* (Emphasis supplied). (U.S. Code Cong. and Ad. News, 1953, 83rd Cong. at 2412; 99 Cong. Rec. 10782, August 1, 1953).

The constitutional amendment requirement is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

> "Mr. Case: . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which make it possible for States which by their compact with the United States, or, in some cases, their con-

stitution, ceded jurisdiction with respect to Indian lands to the United States, *to amend their constitutions so as to come under the provisions of the bill.* I have in mind, of course particularly the situation in South Dakota and *Washington* under the identical enabling act. I understand that the same situation obtains in Montana, North Dakota, and possibly Wyoming.

. . .

"Mr. Barrett: Mr. President, the Senator from South Dakota is correct." (Emphasis supplied). 99 Cong. Rec. 10782 (August 1, 1953).

Congress' intent in Public Law 83-280 is detailed (1) by the sponsors of the act, (2) in congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. *All agreed unanimously that §6 and not §7 govern Washington.*

We now reach the second question facing this Court. What is the meaning of §6 of Public Law 83-280? Close analysis is necessary.

Section 6 begins:

"Notwithstanding the provisions of any Enabling Act for the admission of a state . . ."

and then grants federal consent to amendment of the applicable constitution.

The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

"Mr. Berry: Mr. Chairman, I would like to ask a question. Would it be better to word that to say that this 'shall be applicable,' instead of saying 'consent is hereby granted.' Why not say 'The provisions of the law shall be applicable' to these states

wherein they do these things.

"Mr. Westland: I believe the law would then be applicable to them, once they had taken this affirmative action.

"Mr. Rhodes: Will the gentlemen yield. *You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.*

"Mr. Dawson: That brings up another question: Whether your wording should refer to the Enabling Act. You say 'We hereby give our consent for them to amend their state constitution.' Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say 'Notwithstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution.'

"Mr. Abbott: (Counsel) I believe that clause 'notwithstanding any provision of the Enabling Act' for such states might well be included. *It* would *make clear that Congress was repealing the Enabling Act.*

"Mr. Dawson: *To give permission to amend their constitution.*"

(Emphasis supplied). July 15, 1953 Committee Hearing on H.R. 1063, folio 8, and 9, Yak. App. I, pp. 26-27.

When Congress did act favorably on the legislation its intent to amend the Enabling Act for the *limited* purpose of allowing constitutional amendment, became law. But it must be firmly kept in mind that the Enabling Act amendment was only *conditional* and would only become operative by virtue of state constitutional amendment. The provision of §6 underscores this conclusion:

" . . . *Provided*, That the provisions of *this* Act shall not become effective . . . *until* . . . " (Emphasis supplied). Stat. 588 at 590.

Thus, Congressional consent in §6 of Public Law 83-280 to state assumption of Indian jurisdiction depends upon amendment of the applicable constitution. This twofold conclusion of Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

"Mr. Berry: Does not this make this bill applicable to all states who do amend their laws under the constitution, and it greatly increases the authority of the bill.

"Mr. Abbott: (Counsel) The intention was to grant it to all states at such time as they were willing to take it. The five states we have named have been consulted with by the Indian Bureau. *Any other time in the future that the State of Washington or South Dakota is able to remove their constitutional impediments, they could so do it . . .*

"Mr. Westland: I believe the State of Washington was consulted on this mater and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment [referring to §6] in order that they can get at it." (Emphasis supplied). July 15, 1953 Committee Hearing on H.R. 1063, folio and 7 and 8, Yak. App. I, pp. 25-26.

Then the Committee began consideration of §7 which provides Indian jurisdiction for any of the other eighteen optional states with Indian populations,

" . . . at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to the assumption thereof." 67 Stat. 588 at 590.

The contrast between the language of §6 of Public Law 83-280 authorizing "the people of any state to amend . . . their state constitution" and that of §7 of Public Law 83-280 providing that "the people of the State shall, *by affirmative legislative action*" points up quite forcefully Congress' intent that the triggering event for state assumption in Washington would be a constitutional amendment and not a statute enacted by the legislature. The point was driven home once and for all in the June, 1953 Indian Affairs Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order of the Bureau of Indian Affairs, presented the version of the bill that would extend its effect outside of California.

"Mr. Abbott: (Counsel to Committee) Mr. Benge informs me that there are 26 states shown there as having Indian populations. You can correct it for the record. Mr. Benge, but I believe several of those states have constitutional prohibitions against jurisdiction.

"Mr. Benge: Yes, sir; that is right.

"Mr. Abbott: Which would mean that there would be apparently no jurisdiction.

"Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. The Organic Act which admitted the state to the union and the state constitution would have to be amended. The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would have to amend the constitution.*

"I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.

"Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*

"Mr. Benge: *Yes, sir.*" (Emphasis supplied) June 29, 1953 Sub-Committee Hearing on H.R. 1063, folio 23-24, Yak. App. I, p. 27.

This again effectively demonstrates Congress' intent that §6 of Public Law 83-280 authorizes Washington to assume Indian jurisdiction not by mere legislative action but only conditionally upon amendment of this constitution by the people of the state.

One difficulty remains, however, §6 of Public Law 83-280 authorizes amendment of the constitution "or existing statutes . . ." Does that not mean that simple legislation action without constitutional amendment is alternatively authorized by §6 for Washington? Are §6 and §7 interchangeable in some cases?

Such an interpretation will not do. First, it would make §6 and §7 equivalent, and therefore §7 totally redundant in blatant violation of the maxim of avoiding redundancies. Second, this Court favors another reasonable interpretation if permissible, *United States v. Landram*, 118 U.S. 81 (1886). Another interpretation is permissible. It is required by the Eighty-Third Congress' clear legislative purpose to the contrary. Finally, and providentially, the very problem occurred to Con-

gressman Wesley A. D'Ewart of Montana during committee deliberations.

"Mr. Westland: This amendment would insert two new sections. First is section 6, which says: 'The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions o rexisting statutes" . . .

"Mr. D'Ewart: *I do not think we have to grant permission to a state to amend its own statutes.*

"Mr. Abbott: (Counsel) Mr. D'Ewart, I believe *the reasons for that is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, but by some state courts it may be interpreted as being necessary.*" (Emphasis supplied) July 15, 1953 Committee Hearing on H.R. 1063, folio 6, lines 18-22, folio 7, lines 5-11, Yak. App. I, p. 25-26.

The grant of permission to amend statutes in §6, then, is an extra measure of consent to states with disclaimers of Indian jurisdiction in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be *in addition* to constitutional amendment even though possibly "unnecessary", and is decidely not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma, North Dakota, and South Dakota. The extra measure of consent to amend statutes in §6 is limited to those three states. Washington has *no* such statute.

The Washington State Constitution expressly dis-

claims jurisdiction over Indian lands. Though proponents of state jurisdiction did unsuccessfully attempt to remove this constitutional disclaimer, this action failed to even get the necessary two thirds legislative approval and was not submitted to the people for approval as the Washington State Constitution requires. It is also to be noted that in neither the enactment of Chapter 240, Laws of 1957, nor Chapter 36, Laws of 1963 (R.C.W. 37.12) which only required a majority vote, did the legislature indicate that the constitutional disclaimer be amended, revoked or that the people of this state gave their consent to the revocation of its provisions. These ignored provisions of the Washington State Constitution are mandatory."[59] Even if this legislative action satisfies Public Law 280's requirements, it would not afford the Yakimas substantial due process of law.

Washington has not complied with the statutory requirements of Congress as specified in Public Law 83-280 or the Fourteenth Amendment when it failed to amend Article XXVI of Washington's Constitution.

The Fourteenth Amendment requires that the Yakimas would have the opportunity to present the amendment question to the people of this state in a "meaningful" (by constitutional procedures) manner. *Goldberg vs. Kelly*, 398 U.S. 254 (1970); *New Jersey vs. Wilson*, 7 Cranch 164 (1892).

[59]*Washington Constitution*, Article I, Section 29.

B. Washington's partial geographic and subject matter assumption does not meet the statutory requirements of Public Law 83-280.

Public Law 83-280 ceded to certain listed states full criminal jurisdiction over listed "Indian country" within the state's boundaries, to the exclusion of federal jurisdiction effective immediately and without any requirement of action by the state or the affected tribes. Neither, as originally enacted, or as later amended, did this "automatic" jurisdiction provision apply to the State of Washington. However, the terms of Sections 2a of Public Law 83-280 is relevant in construing the "optional" jurisdiction provisions which Washington seeks to invoke. Where "automatic" jurisdiction is ceded over "offenses committed by or against Indians," it is to be exercised "to the same extent othat such state . . . has jurisdiction over offenses committed elsewhere within the state . . .; that "the criminal laws of such state . . . shall have the same force and effect within such Indian country as they have elsewhere within the state . . ." (18 USC 1162(a)); and that the special federal criminal jurisdiction provisions including the major crimes act are henceforth inapplicable (18 USC 1162(c)).[60]

With this preamble, we examine the provision of Public Law 83-280 which is directly applicable to

[60]Sections 2a and 2c of Public Law 83-280. Yak. App. G. See also 4a, Public Law 83-280.

Washington. Section 6, it is agreed, covers Washington's conditional right to assume jurisdiction; authorizes Washington to "amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal implement to the assumption of civil and criminal jurisdiction *in accordance with the provisions of this Act.*" Since the provisions of this Act in Section 2(a) and 4(a) provides that jurisdiction must be to "the same extent" and have the "same force and effect" within Indian country as Washington exercises elsewhere within the state, the face of the Act is controlling in this case.

The Legislative history on Public Law 83-280 is supportive of the congressional intent contained on the face of the Act. In this regard, the five judge dissenting opinion (J.S. pp. 47-59) to the *en banc* decision below, regarding Washington's partial assumption; is persuasive. Yakima relies on the reasoning contained therein but does not repeat it in this brief. Our discussion herein will be supplemental to that opinion.

Additionally, the Subcommittee hearings in toto clearly demonstrate it was not contemplated that Washington would pass a statute assuming partial jurisdiction. Indeed, it was not contemplated that they would pass a statute. The hearings demonstrate that the exercise of Washington's option, to assume jurisdiction, was to be by amendment of the disclaimer article of its Con-

stitution. The Committee intended that when Washington's exclusive method for assumption was exercised that Washington's jurisdiction over Indians and civil and criminal matters would be *exclusive:*

> Mr. Abbott (Counsel): "I have handed to Mr. Young a proposed amendment [Section 6] which would provide for the granting of consent to states having organic law impediments [Washington]. At such time as they remove those impediments by the people in the state, they could then take over the *exclusive* civil and criminal jurisdiction over Indians and Indian matters." July 15, 1953 Committee Hearings. Folio 3. Yak. App. I, p. 23 (Emphasis supplied).[61]

This Court has previously examined Congressional intent regarding a "checkerboard" system of justice in *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) and could see "no justification for adopting an unwarranted construction . . . where the result would be merely to recreate confusion Congress specifically sought to avoid."

In its *en banc* decision, (J.S. pp. 38-47) a seven judge majority for the Court of Appeals for the Ninth Circuit, was not so constrained. The majority did not reach the question of whether partial assumption would be justified under Public Law 83-280. They read Wash-

[61]This statement carries great weight in this Court's deliberations. *Wright v. Vinton Branch Bank,* 300 U.S. 440, 463-463 (1936); *United States v. United Mine Workers,* 330 U.S. 258, 278-280 (1947); *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474-475 (1921); *Chicago, M., St. P. and P.R.R. vs. Acme Fast Freight,* 336 U.S. 465, 472-477 (1949); *Mitchell v. Kentucky Finance Co.,* 359 U. S. 290, 293-295 (1959); *National Woodwork Manufacturers Association v. Labor Board,* 386 U.S. 612, 639-640 (1967).

ington's partial geographic and subject matter assumption statute as total assumption of jurisdiction subject to a condition precedent that the tribe request total jurisdiction. We think that this court will find the five judge dissent to this *en banc* decision more in line with this Court's previous determination.

The fallacy of the majority reasoning appears within the four corners of the *Quinault II holding*.[62] *Quinault* II, says that RCW 37.12.010 is *total* assumption, and if you want *total* assumption, petition the governor. This reasoning is likewise in error outside of the four corners of the opinion. This court in *Kennerly* (400 U.S. at 427), held that Public Law 83-280 "made no provision whatsoever for tribal consent." *Kennerly*, therefore, is inconsistent with the reasoning of the *en banc* majority and *Quinault II*. In any event, it takes some stretch of reasoning to say that the Yakima Nation, which does not want and has protested state jurisdiction, and has not received adequate services under the Washington partial jurisdiction scheme on a reservation where over 80% of the reservation is in trust status, is under total state jurisdiction. Washington itself, at page 41 and 42 of its brief, acknowledges that Washington chose to take less then total jurisdiction over the Yakima Nation.

[62]*Quinault v. Gallagher*, 386 F. 2d 655, (9th Cir. 1966). The *en banc* opinion designates this opinion as *Quinault II*. We borrow that designation.

The District Court below on Washington's insistence has held and Washington's Attorney General has ruled that Sections 2(a) and 4(a) of Public Law 83-280 requiring jurisdiction to be to the "same extent" and the laws have the same "force and effect" as they have elsewhere in the state are applicable to the State of Washington.[63] Washington now argues that Section 7 of Public Law 83-280 is the applicable portion. Washington's reasoning fails for other reasons than inconsistency. The legislative history is clear and the face of §7 limits that section "to any other state" not covered by §6 or specifically listed. Washington's contention is therefore not valid.

While minority opinion in the *en banc* decision of the Court of Appeals of the Ninth Circuit is persuasive regarding the partial assumption of state jurisdiction by Washington, we do not agree with the dissent's opinion that under Congress' specific direction in §6 that an assumption of reservation by reservation is permitted by Public Law 83-280. We would agree that this is probably the best way to handle assumption. Under this Court's previous rulings, it is the only way that Congress can constitutionally authorize state

[63]1965 Washington's Attorney General's Opinions, No. 68, where the Attorney General opined that Washington's jurisdiction over Indians was exclusive based on the portion of Public Law 83-280 that provided that the State's must assume jurisdiction over Indians to the same extent and the same manner as it does elsewhere within the state.

assumption over the Yakima Reservation.[64] However, the general intent of Congress will not control the requirements specified in Public Law 83-280.

In its partial geographic assumption, Washington determines what portion of the Yakima Indian Reservation is Indian country." Since 18 USC 1151, which is contained in the portion of title 18, that Public Law 280 seeks to amend, defines "Indian country" to be the entire reservation notwithstanding "the issuance of any patent"; Washington's action is foreclosed by the face of the Act. Even if this action were not barred by the face of the Act, Washington's partial geographic assumption is foreclosed by Public Law 83-280's legislative history and this Court's holdings. The burden is not upon the Yakimas to show that Congress did not intend for the State to take such action. This Court has made it clear in *Mattz v. Arnett*, 412 U.S. 481 (1973), that such a congressional determination must be affirmatively expressed "on the face of the Act or be clear from the surrounding circumstances and legislative history."[65] Washington has the burden and cannot meet it.

Washington places great reliance on Interior's Report in subsequent legislation to sustain their burden

[64]To abrogate the treaty right of self-government, as we have herein discussed, Congress must deal with each treaty specifically.

[65]412 U.S. at 504-505. Citing *United States v. Celestine*, 215 U.S. 278 (1909), *Seymour v. Superintendent*, 368 U.S. 351 (1962) and *United States v. Nice*, 241 U.S. 591 (1916).

of a clear showing of legislative intent. In asking this Court to rely on subsequent departmental interpretations, they cite *Shapiro v. United States*, 335 U.S. 1 (1947) and *U. S. v. Jackson*, 280 U.S. 183 (1930). These decisions are inapposite to Washington's position. In *Shapiro*, the Departmental interpretation was not during hearings on subsequent legislation, but was during hearings on the Act involved. We would agree that departmental testimony or reports on Public Law 83-280 are entitled to consideration by this Court in determining Congressional intent. However, since this Court in *Mattz v. Arnett* has determined (412 U.S. at 505, note 25) that subsequent legislation usually is not entitled to much weight in construing earlier statutes; we do not believe that this Court would wish to place much reliance on testimony or reports in subsequent legislation that have even less weight.

However, since the State's entire case is tied to materials in the record of the legislative history of the Indian Civil Rights Act and predecessor bill and is misleading, it would appear that analysis of the legislative history of the 1968 Indian Civil Rights Act must be undertaken. In the Indian Civil Rights Act,[66] enacted as a rider to the Civil Rights Act of 1968,[67] Congress faced a number of problems involved in the relationship

[66]Codified at 25 USC §1301-05, 1311-12, 1321-27, 1331, 1341.

[67]Pub. L. 90-284, 82 Stat. 73. Portions not relating specifically to Indians codified in scattered sections of Title 18, 25, 42 U.S.C.

between the various Indian tribes and the States under Public Law 83-280. The product of that legislative history regarding Public Law 83-280 is Title IV of the Civil Rights Act of 1968.[68] In considering this history, it is acknowledged that the Indian Civil Rights Act may not have a mother. It was produced artificially in the incubator of the serious civil rights turmoil of the late 1960's. However, this Act and Title IV has an acknowledged father. The acknowledged father is Senator Sam Erwin of North Carolina. Therefore, his intent and the intent of the Subcommittee on Consitutional Rights chaired by Senator Erwin merits special attention.[69]

In the early 1960's, Senator Sam Erwin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary initiated a public inquiry to determine whether immunity from Constitutional restraint had resulted in actual deprivation of Constitutional rights of Indians.[70]

Hearings were held in 1961, 1962, 1963, and 1965. From early hearings emerged a broad picture of constitutional neglect of the Indian people which Senator Erwin was determined to remedy. The Subcommittee's conclusions are contained in the *Constitutional Rights of American Indian Summary Report of Hearings and*

[68]Sec. 401 through 406, Pub. L. 90-284.

[69]A complete analysis can be found in 9 Harvard Journal on Legislation 557. Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act,* hereafter cited as "Burnett".

[70]Burnett at 577.

investigations by the Subcommittee on Constitutional Rights.[71] In that summary, the Subcommittee found:

> "During the Subcommittee's investigation, a substantial number of witnesses charged that the enactment of Public Law 280, conferring jurisdiction on various states, had resulted in such a breakdown in the administration of criminal justice in some states that many of their Indian citizens were being denied due process and equal protection of the law." Summary, p. 9.

and the Subcommittee recommended:

> "6. The consent of the United States should be given to any state to assume, in whole or in part, criminal and civil jurisdiction over Indian reservations, provided that the Indian tribes involved consent. The Congress should further authorize the United States to accept retrocession by any state of any civil or criminal jurisdiction." Summary p. 23.

Following this report to Congress on February 2, 1965, Senator Erwin introduced Bills S.961-968 and S. J. Res. 40 to fulfill the Subcommittee's recommendations. Among those bills was S.966 which was to cover recommendation 6. above. In introducing S. 966, and as a statement during the hearings on S.966, Senator Erwin said as follows:

> "Public Law 280, which confers to certain states, civil and criminal jurisdiction over Indian country, was found by the Subcommittees' investigation to have resulted in a breakdown in the administration of justice to such a degree *that Indians are being denied due process and equal protection of the law.*

[71]Filed in 1964, by the Subcommittee hereinafter cited as "Summary."

> Some states claim that Public Law 280 imposes too great a financial burden and that subsidies from the federal government are needed if the states are adequately to enforce law on the reservations. In addition, some states indicate that a piecemeal session by the federal government of jurisdiction over Indian country would be more feasible." (111 Cong. Rec. 1784 (1965) 1965 Hearings, p. 4)[72]

Interior's Report on S.966, dated June 19, 1965, shows that the Department of Justice and the Department of Interior considered this a significant change in Public Law 83-280:

> "We think, however, that the *extension of criminal jurisdiction to the states on a piecemeal basis needs to be considered further.* The Department of Justice has indicated that this approach in the criminal area is undesirable. Such an *extension* of jurisdiction may result in unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs." (1965 Hearings at 320). Emphasis supplied.

In 1967, Senator Erwin reintroduced S.966 as S.1885. Senator Erwin maintained his resolve to repeal Section 7 of Public Law 280 and added the requirement that tribal consent had to be demonstrated by referendum. No change was made regarding authorization of piecemeal assumption. (113 CONG. REC. 13473-78 (1967)). It was during the hearings on this bill that the Department of Interior through its Assist-

[72]Hearings on Constitutional Rights of American Indians, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. 89th Congress, 1st Session (1965). These hearings and similar hearings before this Subcommittee will be designated by the year of the hearings. "1965 Hearings."

ant Secretary, Harry Anderson, filed the report upon which the State now relies. In this report, filed both before the Senate Committee and the House Committee, Assistant Secretary Anderson expresses the view that authority for piecemeal assumption "is *now implicit* . . . "because the *present* law permits the states to assume partial jurisdiction." (Emphasis supplied). Considering the fact that the holding in *Quinault II* was then unchallenged, we do not believe that this is any authority for partial assumption under Public Law 83-280 *as enacted.* In any event, the Congress of the United States in adopting S.1885 as an amendment to the basic Civil Rights Act of 1968 shows that Congress considered Title IV Public Law 90-284 to be a change in the existing law.

In addition to congressional intent that Washington's assumption under Public Law 280 was total, the face of the Act, says that state assumption shall be over "Indian country." As previously discussed, "Indian country" was already defined by Congress to be the entire reservation "notwithstanding the issuance of any patent."[73] The legislative history shows that definition to be firmly in the minds of Congress.

> "Mr. Saylor. Also what Indian country you would recommend, whether all Indian country within the State or whether certain parts of the Indian country can be excepted.

[73]18 USC 1151.

> "Mr. D'Ewart. The phrase "Indian country" is already defined by law and has a very distinct meaning. It is defined in the recodification statutes adopted a very few years ago, and it is very clear." June 29, 1953 Sub-Committee Hearings, Folio, p. 6, Yak. App. I, p. 5.

The prohibition of partial geographic assumption is clear from the face of the Act in the two seperate dscussed areas, and the legislative history clearly shows that partial geographic assumption was not contemplated. The face of the Act and legislative history not only fail to sustain Washington's burden, but they disprove Washington's contention.[74]

III.

Washington's partial geographic assumption does not satisfy Constitutional Equal Protection Requirements.

The Court of Appeals, following this Court's guidelines in *Massachusetts Board of Retirement v. Muguira*, 427 U.S. 307 1976); *Reed v. Reed*, 404 U.S. 71 (1971); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); and *McGowan vs. Maryland*, 366 U.S. 420 (1961); held that Washington's title-based classification fails to meet any formulation of the rational basis test and violates the Equal Protection Clause.

Washington has abandoned its previously stated purpose and now contend that the purpose of Wash-

[74]The state has the burden. *Deleware Business Council v. Weeks*, *supra*.

ington's partial assumption system was to recognize the Yakimas desire for self-government and to recognize the historical and cultural status of trust lands (Washington's brief, pp. 32-39). This purpose is not supported by the record and indeed Washington states this purpose for the first time. Washington's position, in other cases in which we are involved, has been that Washington cannot treat Indians different in enacting or promulgating a state regulatory scheme. That has been Washington's position as late as this year, as the Court of Appeals reports in its April 24, 1978 consolidated decision in *Puget Sound Gillnetters Association, et. al. vs. United States District Court*, No. 77-3129; *Columbia River Fishermans Protective Union, et. al. v. United States District Court*, Nos. 77-3208 and 77-3209, and *United States of America, et. al. vs. State of Washington, et. al.*, Nos. 77-3654, 77-3655, ___ F. 2d ___ (9th Cir., April 24, 1978):

> "The State [Washington] and non-Indian fish catchers argue that to treat Indian fish catchers differently from non-Indians in allocating fishing opportunities and determining fishing regulations is a patent violation of basic equal protection principles. The Washington State Courts have accepted this argument. See *Washington State Commercial Passenger Fishing Vessel Association vs. Tollefson*, 89 *Wash.* 2d 276, 571 P. 2d 1371 (1977)."

Of course, Washington was incorrect in its position and the Circuit Court so held, but this continued contention on Washington's part brings little credibility

to the proposition that the newly stated purpose was Washington's purpose in enacting R.C.W. 37.12.010. In any event, the newly stated purpose does not satisfy this Court's rational basis test.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 37 (1976) is a recent decision of this Court that limits this Court's equal protection standard for determining constitutionality of a state statute that (a) neither disadvantages any suspect class nor (b) infringe on any fundamental interest — to a rationality test.

Reed vs. Reed, 404 U.S. 71, 75-76, provides this Court's appropriate formulation for this test:

> "[T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted]. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.' "[75]

Washington's stated purpose for partial geographic and subject matter assumption does not meet this minimum test. Though Indians can be a permissible clas-

[75]The unusual deference in *McDonald, supra* and *McGowan, supra* has been tightened by this Court's subsequent unanimous decision in *Reed, supra*.

sification, this does not keep the Washington partial geographic and subject matter assumption from violating constitutional standards. Within this Indian class, R.C.W. 37.12.010 establishes several sub-classifications. The first sub-classification, is that only members of the Yakima Nation are considered to be in the Indian classification.[76] The second sub-classification, is the classification of whether the incident took place on non-trust or trust lands.[77] The third sub-classification are the eight subject matter categories listed in R.C.W. 37.12.010.[78] Within these eight category sub-classifications is the further sub-classification between adults and juveniles.[79] All of these sub-classifications must meet the formulation of rational purpose set forth in *Reed, supra*.

Washington faced with the impossible task of providing a rational basis for these classifications and sub-classifications, begs the question by stating that Washington's jurisdictional system is no less rational than the federal jurisdiction system which this Court upheld in *United States v. Antelope*, 430 U.S. 641 (1977). Their analysis of *Antelope*, is superficial. This Court's holding in *Antelope* is that since all parties subject to the applicable laws were treated in an "evenhanded

[76]See Note 16.
[77]R.C.W. 37.10.010.
[78]Id.
[79]Id.

manner", the Fourteenth Amendment was not violated.

The permissible purpose of state assumption under PL 83-280 is to provide for the protection of the person and property of the Indian people. This Court found the specific "primary concern of Congress in enacting Public Law 280, that emerges from its sparse legislative history, was the problem of lawlessness on certain Indian reservations." *Bryan, supra.* Washington's unreasonable, arbitrary, unworkable, discriminatory, unequal system does not foster that purpose and fails to meet even the most liberally construed test of rationality.

The Yakimas do not stop here in their attack on Washington's unconstitutional system. R.C.W. 37.12.010 (a) disadvantages a suspect class and (b) infringes on a fundamental interest. In discussing "suspect class" and "fundamental rights" the Yakimas are operating in the belief that these constitutional ideals are expressed by this Court in "judicially discoverable and manageable standards." *Baker vs. Karr,* 369 U.S. 186, 217 (1962).

In defining a "suspect" class, this Court has operated on the historically correct premise that traditionally the place of preeminence belonged to the affluent, white, Anglo-American male. This Court has likewise correctly discerned that historically at the other end of the spectrum was discrimination on the basis of race.

In the graduations in between, this Court, not unnaturally in its concern not to unduly interfere with other branches of government, has experienced some difficulty. In making this determination, this Court's classic standard definition, first enunciated in *United State v. Caroline Products Co.*, 304 U.S. 144, 153n.4 (1968) has been often relied on. That definition is that a suspect class must be a "discrete and insular minorit[y]." To this classic description, Justice Brennen's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), suggests three further relevant factors: (1) that suspect classes suffer from "an immutable characteristic determined solely by the accident of birth" which "bears no relation to ability to perform or contribute to society;" (2) that suspect classes have suffered "historical vilification", as illustrated by Justice Brennen's ascertion that the nineteenth century "position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes;" and (3) that the suspect class, largely because of past discrimination, lacks effective political power and redress. *Murgia, supra,* defines a suspect class as one who has "experienced a history of purposeful unequal treatment" or has "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."

When you compare the class involved in this instant

case, it is evident that Yakima Indians clearly fit within this Court's standards delineating a (non-racial) suspect class. Certainly Yakima Indians have been a separate distinct minority group of like characteristics and have been subjected to "unique disabilities." Yakima Indians have "immutable characteristics", suffering "historical vilification" and because of past discrimination "lack affective political power and redress." They likewise have clearly "experienced a history of purposeful unequal treatment."[80]

United States v. Antelope, 430 U.S. 641 (1977) does not foreclose Yakima Indians from being a "suspect class". We do not believe that is the holding of either *Antelope*, *United States v. Mazurie*, 419 U.S. 544 (1975), *Morton v. Mancari*, 417 U.S. 535 (1974), or *Fisher v. District Court*, 424 U.S. 382 (1972). We believe this Court has more logically determined that the Indians were not being discriminated against because either (a) they were not making that claim, or (b) they were within an established system of their own laws or (3) that the unequal treatment of Indians was reasonably necessary to accomplish the legitimate federal objectives existing because of the unique relationship between the federal government and Indian tribes. This Court made that very clear in its emphasis

[80]FINAL REPORT OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION, Volume 1, Chapter 1. (1977)

on the tribal membership of the Indian parties in *Antelope, supra* and *Fisher, supra.*

This brings us to the other applicable category of protecting a "fundamental right." We hope in our discussion it is not too fundamental to initially point out that the very equal protection of person and property that the Yakimas request is explicitly specified in the Fourteenth Amendment.

A due process variant of strict review for fundamental rights found its seminal expression in *Palko v. Connecticut*, 302 U.S. 319 (1937). There, in determining that due process does not require the states to abide by the double jeopardy clause, Justice Cardoza stated the two tests for determining whether state action offended due process. These tests were whether the state action (a) subjected individuals to "hardships so acute and shocking that our policy will not endure it," or (2) violate "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Justice Frankfurter also found an "independent potency" in the principle of due process and found that it demanded, in criminal cases, an examination of "the whole course of proceedings in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples toward those charged with most henious offenses." This "fundamental fair-

ness principle" "involved in "fundamental rights" cases can be seen to be operating in *Gideon vs. Wainwright*, 372 U.S. 335 (1963) in which this Court held that accused indigent felons must be provided with free counsel. It was likewise apparent in the civil case of *Brody v. Connecticut*, 401 U.S. 371 (1971) which involved the forma pauperis rights of divorce petitioners. It was also obvious in *Griffin vs. Illinois*, 351 U.S. 12 (1956), where this Court held that the state must provide indigent convicted persons with free trial transcripts. It was likewise obvious in *Douglas vs. California*, 372 U.S. 353 (1963), where this Court held the state must provide free counsel to indigents on appeal. In these cases, this Court emphasized that there could be no equal justice in criminal cases where *uniform* access and treatment by the courts was not accorded *to all*. We suggest this Court's holdings, in these cases, are applicable here.

We also note *Skinner v. Oklahoma*, 316 U.S. 535 (142) where this Court struck down an Oklahoma statute requiring the sterilization of persons convicted of felonies involving moral turpitude. There this Court held that "when the law lays an *unequal* hand on those who have committed intrinsically the same quality of offense" that "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Shapiro v. Thompson, 394 U.S. 618 (1969) contains the fully developed analysis of the required equal protection scrutiny. In *Shapiro*, Justice Brennen, articulated the standard to be applied when classification in state legislation interefered with fundamental rights, saying:

> "[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." (Emphasis supplied)

Under this standard, this Court's analysis of the many preferred state interests in, and reasons for regulation, was very much the strict kind of analysis familiar in First Amendment cases. This Court has used such familiar First Amendment tools as overbreath and less restrictive alternative analysis to strike down state's unequal treatment. Judge Harlan, preferring ,as he consistently did, to use due process, to analyze the propriety of state regulation of important interests; dissented sharply in *Shapiro* from the use of the compelling state interest doctrine.

While there are certain advantages to use due process to analyze the propriety of state regulation, this court apparently would prefer to find an infringement of a "fundamental" right in order to utilize strict scrutiny. In *San Antonio Independent School District v. Rodreguiz*, 411 U.S. 1 (1973), Justice Powell, writing for the majority stated:

"[T]he answer lies in assessing whether there is a

right to education explicitly or implicitly guaranteed by the constitution."

Since the *Rodreguiz* majority could not find in education a right so guaranteed, it refused to apply the strict scrutiny test. Justice Marshall, in his dissent, expanded on his equal protection review position, giving a remarkably full and firm statement to the general proposition that in a system premised by judicial review, it is incumbent upon this Court to scrutinize state legislation to a degree commensurate with the importance of the interest burden.

In the present case, it is evident that no matter what test is used, whether it be the due process lack of availability of the judicial system, the protection of a fundamental interest, or a sliding scale of review depending upon the importance of the matter involved; a degree of judicial scrutiny is required that would forbid Washington's unequal action that is not substantiated in the *necessary* fulfillment of the purpose of Public Law 83-280.

Indeed, any permissible interference with the Yakima Nation's explicit and implicit power to control its internal affairs can only be based on the Yakima's right of protection. This right to be protected from the wrongdoings of non-members is a treaty guaranteed right and fundamental.[81] Citizens may not have a

[81]The basic stated reason for moving Yakimas to the small reserved portion of their ancestral lands was to "protect them from bad white men." See: Treaty Minutes. Yak. App. B.

fundamental right to a government job as this Court stated in *Murgia,* but Yakima Indians most certainly have a right to be protected from wrongful acts. Indeed, it is hard to imagine a more fundamental governmental right.

We believe it is clear, that because of this partial geographic and subject matter assumption and the state's unwillingness or inability to act, that Yakima Indian victims of crimes are not provided with equal protection of their person or property.

Likewise, we would now like to discuss how the inequality under Washington's title based system puts the liberty of Yakima Indian offenders in jeopardy.

The following chart will show some[82] of the unequal differences that is solely determined by the title to the land upon which the offense is committed:

Incident or Offense	*Trust*	*Non-trust*
Any felony	Entitled to a grand jury. Amendment V.	No grand jury, Not provided.
	Petit Jury must provide fair cross section of population 28 USCA §1861	From registered voters. RCW 2.36.060
Non-Capital cases	Release without bail unless won't insure appearance 18 USC §3146	Bail specified without presumption RCW 10.19.010

[82]This is limited because of the difficulty of making comparison between the elements of federal crimes and state crimes.

Incident or Offense	*Trust*	*Non-trust*
Voluntary Manslaughter	10 years 18 USC §1111	$10,000 and 10 years. RCW 9A.32.060
Involuntary Manslaughter	$1,000 and 3 years 18 USC §1111	$5,000 and 5 years RCW 9A.32.070
Carnal knowledge	First offense 15 years and second offense 30 years 18 USC §2032	Five years RCW 9.79.220
Robbery	15 years 18 USC §2111	20 years RCW 9A.56.200

Here again, the fundamental rights of Yakima Indians are in jeopardy to further no rational or reasonable purpose.

IV.

PROVISIONS OF RCW 37.12.010 DO NOT MEET CONSTITUTIONAL STANDARDS FOR DEFINITENESS

Even if Washington's partial geographic jurisdiction exercised bythe State of Washington meets constitutional standards, the partial subject matter assumption does not. Within trust or restricted Indian lands, the State purports to assume criminal and civil jurisdiction over eight enumerated categories:

1) Compulsory school attendance
2) Public Assistance
3) Domestic Relations

4) Mental Illness
5) Juvenile Delinquency
6) Adoption Proceedings
7) Dependent children
8) Operation of motor vehicles upon the public streets, alleys, roads and highways.[83]

There are no provisions in the Washington Act, or otherwise to define what matters are covered by these stated categories. The Yakima Nation believes that this statute, both facially and as applied, fails to meet constitutional standards as announced by this Court. This Court has held that statutes must provide the due process concerns of adequate notice and non-discretionary standards. RCW 37.12.010 satisfies neither concern of this Court.

As regards the notice requirement, *Connolly v. General Construction Co.*, 269 U.S. 385 (1926) has become a touch stone because of its lucid explanation of that requirement:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what condust on their part will render theim liable to its penalties, is a weil recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which neither forbids or requires a doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (at 391).

[83] R.C.W. 37.12.010. App. p. 37.

The fact that the non-discretionary standards test is not as clearly defined, does not detract from its importance to this Court. The fear that lack of specific standards permits police and judiciary unjust discretionary powers, is deeply rooted in this country's history and forms a major policy theme of the vagueness doctrine in *United States v. Reese*, 92 U.S. 214, 221 (1875) and this Court has continued to require that state statutes meet non-discretionary standards as late as *Bigelow v. Virginia*, 421 U.S. 809 (1975). This Court's test is whether the potential for abuse of discretion exists, not whether such an abuse has actually occurred. Often, as here, the language of the statute under scrutiny indicates on its face that a purely subjective judgment may be made.

The Yakima Nation has standing to challenge this statute. 25 USC §1362 reads as follows:

> "The District Court shall have jurisdiction of all civil action, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, when the matter in controversy arises under the constitution, laws, or treaties of the United States."

The Yakima Nation also has standing under this Court's holding of *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975). The Yakima Nation's facial and applied vagueness attack upon the lack of notice and non-discretionary standards is brought on behalf of its members not only for those who can be charged with crimes under this overbroad statute, but also on behalf of the Yakima victims of such crimes. Consider the plight of a Yakima victim who after ascertaining that the offense has taken place on trust lands and has ascertained that the perpetrator of the offense is a person within the purview of the state's statute and who then must then determine whether the offense falls within any of the eight categories. If a determination is made on the victims part that it does fall within one of the eight categories, the victim is at the mercy of the law enforcement officer who regularly makes irregular ad hoc determinations as to the applicability of state law.[84] The overbreath of the statute also has seriously affected the Yakima Nation's ability to exercise its power of control over its internal tribal matters. The Washington enforcement officer is likewise confused as to what is covered by these eight enumerated categories. There is no portion of this controversy that is so froth with irratic enforcement, decision and improper irregular protection of the person and property as exists under this wide-open subject matter assumption by the state. No one — we repeat — no one knows what areas those eight listed categories cover.

[84]Even the prosecuting attorney of Yakima County states that R.C.W. 37.12.010 has been interpreted differently by prosecuting attorneys. Tr. 212.

V.

ALTERNATIVELY — THE QUESTION OF WHETHER R.C.W. 37.12.010 IS CONCURRENT — OR EXCLUSIVE — ARISES

This Court, like the Circuit Court, may not find it necessary to reach the question of whether Washington's jurisdiction under R.C.W. 37.12.010 is concurrent or exclusive. The District Court held that Sections 2(a) and 2(c) of Public Law 83-280 applied and that Washington's jurisdiction was exclusive. If 2(c) is applicable, it does remove federal jurisdiction from the reservation. However, there is nothing in Sections 2(a) or 2(c) of Public Law 83-280, that limits the power of the Yakima Nation to punish tribal offenders. Under the authority of *United States v. Wheeler*, 46 L.W. 4243 (March 22, 1977), the Yakima Nation has jurisdiction to punish tribal offenders and if necessary, this Court should overrule the holding of the District Court below and so declare.

CONCLUSION

For the reasons above, this Court should sustain the holding of the Circuit Court striking down R.C.W. 37.12.010 and reverse the judgment of the District Court below.

Alternatively, this Court should hold that R.C.W. 37.12.010 is concurrent with tribal jurisdiction and reverse the District Court below.

Dated: May 20, 1978

Respectfully submitted,
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Counsel for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 1978, three copies of the Brief of Appellee and seperate Appendices were mailed, postage paid, to Slade Gorton, Attorney General, Malachy R. Murphy, Deputy Attorney General, Timothy R. Malone, Assistant Attorney General, Paul Majkut, Assistant Attorney General, Temple of Justice, Olympia, Washington 98504, attorneys for appellant, State of Washington, Dixy Lee Ray and Slade Gorton. I further certify that on this 25th day of May, 1978, three copies of the Brief of Appellee and seperate Appendices were mailed to Jeffrey Sullivan, Prosecuting Attorney, Yakima County Courthouse, Yakima, Washington 98901, Attorney for Appellants, Yakima County, Les Conrad, Graham Tollefson and Charles Rich. I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants.

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO APPELLEE'S BRIEF

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APPENDIX A

TREATY WITH THE YAKIMA, 1855

Articles of agreement and convention made and concluded at the treatyground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kahmilt-pah, and Se-ap-cat, confederated tribes and band of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

* * * *

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries to wit:

[DESCRIPTION]

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribes and and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any

ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner of claimant.

* * * *

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defense, but will submit all matter of difference between them and other Indians to the Government of the United States or its agent for decision, and abide therby. And if any of the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

APPENDIX B

A true copy of the Record of the official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Gov. & Supt. W.T., and Joel Palmer, Supt. Indian Affairs O.T., on the part of the United States with the Tribes of Indians named in the Treaties made at that Council. June 9th and 11th, 1855.

[fol. 97] Proceedings at Indian Treaties in Washington Territory East of the Cascade Mountains.

Programme of operations at the Walla Walla Council decided upon by the Commissioners Gov. Isaac I. Stevens and Superintendent Joel Palmer, May 22nd A.D. 1855.

Present—Indians common to both Territories, Oregon and Washington, viz. Nes Perses, Cayuse and Walla Wallas. Tribes in Oregon from the western boundary of the Snake Tribe to the Cascades of the Columbia. Tribes in Washington from the Bitter Root to the Cascades, except the Spokanes, Coeur d' alenes, Colvilles and Pend D' Oreilles.

Gov. Stevens and Gen'l Palmer Superintendent of Washington and Oregon to act jointly for the Nes Perses, Walla Wallas and Cayuse common to the two Territories. To agree upon the terms of treaty. To sign jointly. Each acting for the Indians the above tribes in his own jurisdiction.

Gen'l Palmer sole commissioner for the Oregon Indians proper present at the council.

Gov. Stevens, sole commissioner for the Washington Territory Indians proper present at the Council.

Gov. Stevens to Preside at the Council

The proceedings to be carefully recorded for the Tribes common to the two Territories separately by the Secty. of Gov. Stevens and the Secty. of Gen'l Palmer.

The two records to be carefully compared and certified jointly by the commissioners.

Each commissioner to appoint an agent and commissary. Gov. Stevens for the Washington Nes Perses, Cayuses and Walla Wallas. Gen'l Palmer for the Oregon Nes Perses, Cayuses and Walla Wallas. Goods and provisions to be distributed to the Nes Perses, Cayuses and Walla Wallas, by the Superintendents in proportion to the Indians under the jurisdiciton of each.

6–9829

Officers of the Joint Treaty

Gov. Stevens, Gen'l Palmer, Commissioners.
James Doty, Sect'y for Washington Territory.
Wm. McCoy, Sect'y for Oregon Territory.
H.A. Crosbie, Commissary for Washington Territory.
C. Olney, Commissary for Oregon Territory.
Agent R. F. Lansdale, in charge of Washington Nes Perses, Cayuses and Walla Wallas.
Agent R.R. Thompson, in charge of Oregon Nes Perses, Cayuses and Walla Wallas.
Wm. Craig, Interpreter, Washington Territory.
N. Raymond, Interpreter, Washington Territory.
—Leaufoher, Interpreter, Oregon Territory.
John Flette, Interpreter, Oregon Territory.

[fol. 98] Census of the Nes Perses, Cayuses and Walla Wallas

	Washington Ter'ty	Oregon Ter'ty	Total
Nes Perses	1400	400	1800
Cayuses	150	350	500
Walla Wallas including Utillas	600	200	800
	2150	950	3100

This census to be revised on the Indians reaching the ground.

A public table for the prominent cheifs under charge of agents Lansdale, Thompson and Bolon.

Gov. Stevens details Palmer and F. Genitto.

Sup't Palmer also details one or two men.

Coll. Crosbie to take personal charge of issues for public table, of issues of provisions to Indian tribes, and goods distributed. Provisions and goods to be turned over to the agents, and issued under their direction.

May 28th, Monday.

Agent Bolen with an interpreter went to meet the Yakimas who are supposed to be near at hand, and returned

at 10 a.m. having seen Cam-i-ah-kum and also the Cheif Pee-o-pee-mox-a-mox.

The latter had said to Mr. Bolon, "that someone had informed him that the cheifs and other in the Commissioners camp had said that he was unfriendly to the whites. That his heart was with the Cayuses whose hearts were bad. He was very sorry to hear this. He had always been friendly to the whites and was so now. He should go today to see the commissioners, and ask why such things had been said of him."

The Commissioners and Sec'ty Doty visited the Lawyer at his lodge, as he was unable to walk without great difficulty. An old gun-shot wound received at the battle of Pierres Hole, having broken open again causing much pain.

The Lawyer explained a map of the Nes Perses country which he had drawn for Gov. Stevens. Several Cheifs came in and suddenly U-u-sune-mal-e-can, (one of the cheifs) said:

"The Cayuses wish us to go to their camp and hold a council with them and Pee-o-pee-mox-a-mox.

What have we to say to the Cayuses or Pee-pee-mox-a-mox? What are their hearts to us? Did we propose to hold a council with them or ask them for advise? Our hearts are Nes Perses hearts and we know them. We came here to hold a great council with the Great Cheif of the Americans, and we know the straight forward truth to pursue and are alone responsible for our actions. Three Cayuses came last night and spoke to Jim and two other head men urging them to come to a council at the Cayuse camp, to meet Pee-o-pee-mox-a-mox and Cam-i-ah-kum. He did not wish to go; they insisted; then I said to them: You had best say no more. His mind is made up.

What do you come here for and ask these cheifs to come to a council when to the Head Cheif and the rest you say nothing? Have we not told your messenger, yesterday, that our hearts are not Cayuse hearts? Go home! Our cheifs will not go. We have our own people to take care of they give us enought trouble, and we will not have the Cayuse troubles on our hands. This is my heart."

[fol. 99] Lawyer opened a book containing in their own language the advise left to them by their Great Cheif Ellis, and read as follows: Ellis said,

"Whenever the Great Cheif of the Americans shall come into your country to give you laws, accept them! The Walla Wallas heart is a Walla Wallas; a Cayuse heart is a Cayuse; so is a Yakamas heart a Yakamas; a Nes Perses heart is a Nes Perses heart; but they have all received the white law. They are all going straight, yes! While the Nes Perses are going straight, why should they turn aside to follow others who are going straight? Ellis, advice is to accept the white law. I have read it to you to show my heart."

The Commissioners were glad to hear what had been spoken. They knew the Nes Perses were always friendly to the whites. Lewis & Clark had said this and all white men. The Commissioners were friendly to all Indians, and when they come together would tell them so, and show it by what they propose to do. They had no more to say now because when they spoke they wanted all the Indians to hear. The Commissioners then returned to camp.

At 11 a.m. Pee-o-pee-mox-a-mox, Cam-i-ah-kum, Owhi, Skloom and a number of Walla Wallas and Yakamas rode into camp, and having shaken hands in the most friendly manner, with the Commissioners and agents, seated themselves under the arbor in front of the Commissioners tent and indulged in a smoke; using their own tobacco exclusively although other was offered them.

Gov. Stevens then said to them: "My friends, we are gald to see you. We are glad to see all the Indians around here, and what we say to one is the same to all. You will see that what we say to one tribe is spoken to all the tribes. When you are ready to come into council, when the council is opened, we will speak to you of the important business for which you have been called together. We have near to our hearts the prosperity of the Indians and the propositions to be made to you will prove this.

We shall endeavor to clearly explain the wishes of the Government, in order that you may fully understand them; as it is our desire you should.

If it is convenient to you we will suggest tomorrow at noon as the time for opening the council. We look upon you as friends, shall so speak to you; as one friend speaks to another, and wish you to reply as such.

Gen'l Palmer said: I am equally pleased with Gov. Stevens to see you. Many years ago I met you and considered you friends, and I look upon you as the same now, and hope our meeting will prove this to be true.

We come here to promote peace and happiness among you, leaving behind all that was bad, bringing only that which was good; thus we have but one heart. When you understand this then there will be no difficulty, but we will all work together for the best.

As all the cheifs are not here we will not speak of important business, but wait till all are present.

I wish to know if the time fixed by Gov. Stevens for opening the council is good, and if you will meet.

[fol. 100] Pee-o-pee-mox-a-mox said: I want more than one interpreter at the Council, that we may know they translate truly.

Gen'l Palmer said: You may have any one who can comprehend what he is told to interpret, and who will suit you. We wish you to understand clearly what is said. Will you designate a interpreter whom you have confidence in?

The Chief said: I do not wish my boys running around the camps of the whites as these young men do. (alluding to some young Nes Perses who were lounging about our camp feeling quite at home as they knew themselves to be among friends.)

Pee-o-pee-mox-a-mox said: We have rode over today merely to see the Commissioners.

Gov. Stevens said: Come and see us as our friends and guests. Cam-i-ah-kum knows that our people have been in his country, and eaten of his food. So of Pee-o-pee-mox-a-mox and the Nes Perses. We always give food to our friends when they visit us, you have been invited to come and you are welcome to whatever we have.

We have a public table at which we are glad to have all our friends sit, and share that which hospitality induces us to offer.

We have provided plenty of food, and have already given beef, corn, and potatoes to those on the ground. They were invited and we wish them to have plenty to eat.

I was glad to hear that my friend Skloom had been so kind to Mr. Tinkham one of my party who crossed the mountains. He was in want and Skloom gave him provisions and clothing.

The Cheifs then took their leave.

[fol101] Proceedings at the Council Held at Camp Stevens, Walla Walla Valley, on the 29th day of May 1855.

Gov. Stevens, Superintendent of Indian Affairs in Washington Territory, and Gen'l Joel Palmer, Superintendent of Indian affairs in Oregon Territory, with the following named cheifs, delegates and head men present at the Council, and representing their respective tribes and bands of Indians as below stated.

For the Nes Perses: Lawyer, Joseph, U-u-sune-mal-e-can, James, Timothy, Red Wolfe, Spotted Eagle, Three Feathers, Jason, Jacobs, Cow-pook, Is-coh-tim, Kay-kay-map, Tu-per-lan-its-a-kum, Billy, Toh-ton-mol-e-wot, The Snipe, Bold Eagle, and others.

For the Cayuses: The Young Cheif, Steachus, Camaspilo, and others.

For the Walla Wallas: Pee-o-pee-mox-a-mox.

For the Yakamas: Cam-i-ah-kun, Ow-hi, Skloom, Kow-was-say-ic, Si-ry-was, Skin-pah.

For the Palouses: Kah-lat-toose.

For the Spokanes: Gerry.

For the Pisquose and Metows.

For the Oak-kin-a-kanes.

On May 29th, at 2:02 p.m. the Council opened. Present; the commissioners, officers of Treaties, the Indian agents, and some fifty citizens.

Besides the Indian cheifs already mentioned and some others, about 1800 Indians, Nes Perses, Cayuses, Walla

Wallas, Yakamas, Dalles Indians and others on the Columbia above were assembled.

After the pipe had been smoked sometime, Gov. Stevens said:

"My Children: Before entering upon the council we must have good and faithful interpreters. We want men who will state truly and exactly all that is said; we want men that you know to be good men: men that you can trust; we want no others.

We propose as interpreters for the Nes Perses, William Craig, this man, (pointing to Mr. Craig) who has longer lived with you, also McDauphin and Delaware Jim.

For the Cayuses Mr. Pembrom and Mr. Olney.

For The Walla Wallas and Yakamas, John Whiteford.

Thuse for each language we propose to have two and three interpreters. Now I ask you, do you want others added to the number? Are you satisfied with these men? If you have any others you wish to propose, speak out, for we wish you to be satisfied.

Stachuse, a Cayuse said: We know of no others whom we would wish. There may be some words hard for them to make us understand, but we think the arrangement good as it is.

Gov. Stevens said: We know of no others whom we would say to you, stop us and we will repeat it.

[fol. 102] Each interpreter will now be sworn to be a faithful interpreter.

Gov. Stevens then administered to the interpreters the following oath.

You solemly swear inthe presence of Almighty God, that you will well and truly interpret to the best of your ability what may be said by the Commissioners for the United States holding this council on the one part; and the chiefs and head men of the tribes and bands of Indians here present on the other part. So help you God.

Gov. Stevens then said: My children, the interpreters have each taken a solemn oath in the presence of Almighty God to be true and faithful interpreters. I will now read the form of the oath. (and it was read as above.)

Gov. Stevens continued: My children; I have much to say to you; my brother here Gen'l Palmer will have much to say

to you. We want you to listen and be comfortable at the same time. We want clear skies, we want the ground to be dry. We will meet tomorrow with a clear sun and the day before us. Then we will open the whole subject, and will see if our hearts and your hearts will not come together.

We have met as friends today, tomorrow we will meet as friends and then enter upon our business. I therefore adjourn the council till 10 o' clock a.m. tomorrow. The weather is rainy and bad, tomorrow we hope the skies will be clear and you will all be able to be present. Should it rain tomorrow we will meet when it clears up.

One word on another point, you have come here by our invitation and are our guest. I have entered, and so has my friend here Gen'l Palmer, many an Indian lodge, and they always gave us to eat and drink. We therefore have brought provisions which we offer to you as a friend to a guest; and we therefore trust you will all feel free to receive the provisions we have brought to furnish you with as our guests.

I propose to the Walla Wallas, Cayuses and Yakamas that you take two oxen, drive to your camp and slaughter for yourselves.

Young Cheif replied: We have plenty of cattle, they are close to our camp. We have already killed three and have plenty of provisions.

Gov. Stevens said: We are much pleased to hear you are so well provided for, but we have plenty of provisions and you are welcome to them.

Young Cheif replied: We have plenty at present. We do not throw away your offer. If we want any we will come to you.

Gen'l Palmer (to the interpreter): Say to the Yakamas: You have come a long ways. You may not have provisions. If you want any we have them and you are welcome.

Young Chief said: Cam-i-ah-kun is supplied at our camp.

Gov. Stevens said: There will be no more said today unless you wish to say something.

Young Chief said: We have nothing to say today; the weather is bad, rainy. We do not throw away your offer; when we are done talking you will know our hearts. We will talk slow not all in one day. No snow falls at this season of

the year. There will be time for you to go anywhere you wish.

[fol. 103] The council then broke up and nearly all the Indians returned to their camps.

Pee-o-pee-mox-a-mox and Cam-i-ah-kun dined with the commissioners and remained in their tent sometime smoking in a friendly manner.

Timothy, a Nes Perses cheif acted as crier for his nation and he will also record in their language the full proceedings each day of the council and this will be preserved among the archives of the nation and handed down to future generations.

May 30th Wednesday.

At 1 o'clock P.M. the Indians began to assemble and at 1¾ P.M. the Council opened. Present same as yeasterday.

Gen'l Palmer said, My friends, I am glad to see so many of you here today: Yesterday the council was organized and Interpreters sworn to repeat to you what we say. Today my brother in Council will speak to you the great desire that our Chief has to promote your good.

I know that our Great Chief has a good heart. I know that my brother Gov. Stevens has a good heart, that they both desire to do and act for your good. I hope then you have come here with good hearts to listen to what he has to say. We both come here to talk to you as men and not as boys; we throw behind us everything that is bad, and come to you with one heart: we hope you have done the same: You are men able to judge between good and bad: and when my brother speaks to you, you can judge whether it be good or bad.

For the present I am done, and my brother will speak to you.

Gov. Stevens said. My Children: The sky is clear, the ground is dry, my heart is glad to day. Our hearts are glad. You are men: You have families: You have the means to live.

You have all of you been friends to me and mine; Two years since I came among you: Two years only have I know you; I came from the great waters beyond the mountains, across the mountains, and you have all been friends to me.

The Nes Perses. Lawyer fed my men driven out of the mountains by snow: The Cayuses and Walla Wallas received my men kindly; Pee-o-pee-mox-a-mox saw us in his country and gave us guides: the young cheif and his people had nothing but smiles and kindness for us; and yesterday Cam-i-ah-kun showed me a paper from Capt. McClelland saying that he furnished guides and welcomed them on their way.

So to the North and East; there sits a Flat Head and there a Coeur D'lane on the route across the Bitter Root; there are Poulouses and Colvilles and Spokanes away to the North; there are also men from both sides the river, from far down; all were kind, and I brought a message to all, from a tribe beyond the mountains: I have been among the Blackfeet and have brought word that they would meet you in Council, and that war should cease.

I met you in the trail, I saw your people in the Buffalo country: I met your people on the road to the Buffalo country: My heart said peace in the Buffalo country, peace here; peace is here now: peace between yourselves, peace between us. So for your kindness to me I am your friend, and I came from the Great Father to be your friend.

The interpreters yeasterday took a solemn oath to speak truly. I took a solemn oath and my brother took a solemn oath to be your firends.

[fol. 104] The Great Father has learned much of you. He first learned of you from Lewis & Clark; Pee-o-pee-mox-a-mox remembers Lewis & Clark, the Lawyer does: they came through your country finding friends and meeting no enemies.

I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you. My brother wrote to the Great Father in like manner.

He told the Great Father, these men have farms; the Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase: I told him some of your grown people could read and write: He answered, I want all the grown people and all the children to learn to read and write; I told him that some of you were handy at trades; he answered, that he desired to give all who choose the means to learn these trades;

Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Because you are his children; his red children are as dear to him as his white children; his red children are men; they have hearts, they have sense; they feel kindness, they resent injury: we want kindness on the one side and kindness on the other: We want no injuries to resent.

The Great Father has been for many years caring for his red children across the mountains; there (pointing East) many treaties have been made. Many councils have been held; and there it had been found that with farms and with schools and with shops and with laws the red man could be protected.

Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? they came from the Great Father; did I and mine make trouble? No! but the trouble had been made generally by bad white men and the Great Father knows it, hence laws.

The Great Father therefore desires to make arrangements so you can be protected from these bad white men and so they can be punished for their misdeeds; and the Great Father expects you will treat his white children as he will make a law they shall treat you. We are now in council to see if we can arrange the terms which will carry this into effect.

Let us go back to old times across the mountains and see what was there done: the red man received the white man gladly; but after a while diffculties arose; the blood of the red man was spilled and the blood of the white man; there was cold; there was hunger; their was death. But a man came, William Penn, and said I will see if my white children and my red children cannot be friends, and they were friends: Wm. Penn and the Indians came together as we now come together; they made a Treaty: there was peace; and no white mans blood and no red mans blood had been shed, and there has been peace to this day; this was in olden times.

Oh! these people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were but few whites, did not work

well when there were many. It was found that when the white man and the red man lived together on the same ground, the white man got the advantages and the red man passed away.

The Great Fathers name at that time was Andrew Jackson: he said I will take the red man across a great river into a fine country where I can take care of them; they have been there twenty years; they have their government, they have their schools, they have their own laws; their Chief John Ross knows as much as my borther or myself and a great [fol. 105] deal more; he is what you call a Lawyer: he is an Indian, a Cherokee. When he goes to see the Great Father the President, he sits with him at table as you sit with us at table.

Before you met my brother and myself in council, you have your own council; and the Great Father when he acts has his council also, he has his cheifs.

When I saw the Great Father he called his Chiefs together, and had a council about you. He has two chiefs who have the care of the red men, their names are Gen'l Orr and Robert Johnson, I want you to remember them. Robert Johnson lives near John Ross; they both told me that what had been done for John Ross should be done for you, and more, as I will tell you.

As we grow older, we learn more and grow wiser; so of the Great Father and his chiefs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had farmers, they had doctors. I repeat again no white man could go there unless the red man consented to it.

North of that tract of land the whites are going in but they cannot enter it; South of that tract of land the whites are going in but they cannot enter it; that tract of land is the Indians home; his home and the home of his children.

There are other tracts of land East of the mountains set apart for the red mans home; for there are many tribes. Those tracts the white man cannot enter without the con-

sent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field: the Great Father and his cheifs now think that is not good: the Great Father said, the white man has his farm, his cattle and his horses, the red man shall have his farm his cattle and his horses; the Great Father says that when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children.

On each tract we want an agent to live who shall be your brother, and who shall protect you from bad white men. I shall speak more of this subject by and by.

On each tract we wish to have one or more schools: we want on each tract one or more blacksmiths: one or more carpenters; one or more farmers: we want you and your children to learn to make ploughs, to learn to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

Then you the men will be farmers and mechanics, or you will be doctors or lawyers like white men; your women and your daughters will then teach their children, those [fol. 106] who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, balcksmiths, wheelwrights and mechanics: besides this we want on each tract a saw mill and a grist mill.

Now we want you to agree with us to such a state of things; You to have your tract with all these things; the rest to be the Great Father's for his white children.

Besides all these things, these shops, these mills and these schools which I have mentioned; we must pay you for the

land which you give to the Great Father; these schools and mills and shops, are only a portion of payment. We want besides to agree with you for a fair sum to be given for your lands, to be paid through a team of years as are your schools and your shops.

Now these payments are something you will have to think much about. Whatever is done is done with your free consent; I have more to say about these payments, about the agent, and about your doing better, as I think you will if we can agree.

I am tired of speaking; you are tired of listening. I will speak tomorrow. My brother will now say a few words to you.

Gen'l Palmer Said, I shall say but little to you today; it is not expected we can come together with one day's talk; nor do we expect yo can understand with what has been said all that we want. You will not make up your mind until you hear all we have to say.

Tomorrow my brother will say something more to you; when he is through then I will speak to you. Sometimes when people have a matter to settle they commence way off; but as they understand each other they come together. With us, if we commenced way off, I hope we are a little nearer now, and by and by I hope we shall come quite together.

As we expect you are tired sitting, and as we do not wish to say too much at once, we will speak no more.

We will meet tomorrow if you like, at an earlier hour say 10 A.M. and you can come without our sending for you. If any present wish to say anything, we are ready to listen to it.

No reply was made by the Indians and the Council then adjourned as 4½ P.M.

[fol. 107] May 31st. Thursday.

The Indians assembled at 11½ A.M. and at 12 P.M. the council commenced.

Gov. Stevens Said, My children. I said to you yesterday we want you to agree to live on tracts of land, which shall be your own and your childrens; we want you to sell the land you do not need to your Great Father; we want you to

agree with us upon the payments for these lands; we want you to have schools and mills and shops and farms; we want you to have teachers and millwrights and farmers and artisans; we want your people to learn to read and write; your men and boys to be farmers or millwrights or mechanics, or to be of some profession as a lawyer or a doctor. We want your wives and daughter to learn to spin and to weave and to make clothes and all the labor of the house; this for a number of years as we may agree.

I said yesterday this would only be a part of the payment. We want also for a certain number of years to furnish you with some clothing, clothing for your men, your women and your children.

I will mention only some of the principal articles; there will be blankets and cloth for leggings, clothes made, shirts and other articles for the men and boys; there will also be blankets and shawls and calicos and shirting and other articles for the women and girls. The particular articles however will be agreed upon between yourselves each year; you may want certain articles one year, and different articles the next.

Besides clothing we would wish to furnish you with tools and implements for the shops; for the blacksmith; for the wheelwright, for the tin-smith and such other tools as you might need; we also want to provide you with tools for your farms, with ploughs and hoes and shovels and when you get further advanced with reapers and all the implements the white man has; we want in your houses plates and cups and brass and tin kettles; frying pans to cook your meat and bake ovens to bake your bread, like white people.

I have told you about the mill to grind wheat and corn, and about the mill to saw boards and lumber, and that we should employ carpenters in your service.

We want you by and by to live in houses and we shall furnish you with a mill to saw lumber, and with carpenters, and your own people by and by will become carpenters and then you will have houses; all this for a term of years. Then we hope that all you people, every family will have its farm, its cattle, its horse, and I trust, its sheep; then I said you will have your own teachers, and your own schools; you will have your own smiths, your own wheel-

wrights, your own carpenters, your own physicians and lawyers and other learned men.

I told you of John Ross. As your fathers and your friends we think this will be good for you.

In thinking over the matter we want you to bear in mind what you have seen and what you know. That venerable old man Jim recollects when he first saw a house in this country; you all of you recollect when you first saw cattle, now you count your horses and your cattle by thousands.

The horse carries you wither you wish to go, yourself, your wife, your children; and your packs, and he works in your fields; your cattle now furnish you with a portion of your food; your cows furnish you with milk and you already know how to make butter; we trust you will make butter and cheese, and that your women will all have churns. Formerly you raised no wheat, no potatoes. Now you have both grain and vegetables. Is not this a great change? A change which you all have seen? Has it not been for your good?

[fol. 108] Let us look at it now in a different way. My brother said yesterday he would have much to say today.

We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there. What has disturbed you on those plains? The Blackfeet tribe of Indians who stole your horses and murdered your grown people and your children; we want that to cease forever.

The Blackfeet are not all bad people; they have some good cheifs among them and some good men; a part of them promised me two years ago not to make war upon you , and those have kept their promise; I could not see all, and those I could not see have since given trouble. But I left with them a man who spent a whole year with them; a man whom you have seen here; a man who writes at that table. He traveled all through their country, sometimes alone sometimes with two or three men; he saw them all, he talked to them about you, and they promised to meet you in council this year and make a peace with you, to murder no longer your people, to steal no longer your horses.

The Blackfeet have now begun to think, if we stop stealing horses from the Indians this side of the mountains, what will become of our bands of horses? They will pass away. Raise your own horses says Mr. Doty as do the Flat Heads, the Nes Perses, the Cayuses, the Walla Wallas, the Coeur D'lanes, the Spokanes, the Yakamas and so back to the Flat Heads again. The Blackfeet then said, the Buffalo are not as plenty as formerly, we have to cut too many old bulls.

Mr. Doty then talked about you, said you had your fields, horses and cattle, and raised your own milk, meat and vegetables; the Blackfeet then said we too would like to have farms; we would like to have cattle and milk and bread.

The Blackfeet and other tribes who live in the Buffalo country, see that the Buffalo cannot subsist there forever; they feel that unless they change their mode of life, they will soon pass away.

They desire to change their mode of life. We shall help them provided they agree not to molest you.

When you see the Blackfeet at the Council they will ask you many questions, they will want you to tell them when you first had horses and cattle, and when you first had crops. If we agree at this council they will ask you all about that; and you will tell them you have not as much game as you once had, and the time is coming when you will not have dressed skins for your clothing; you will tell them the Buffalo is passing away, and the time will come when we will not have robes for our tents and lodges; we have already changed and found it for our good, and we aredetermined to make another change in good season; we have made a bargain with the Great Father; we will have instead of tents of lodge skin when there are no Buffalo, house of boards and of lumber; when the elk and the deer and the buffalo pass away, then we will have clothing, every man and woman and child like the white man; we have enough now to do to get roots and game and berries for our children; but we intend then to raise enough for our women and children, when their numbers have increased, and roots and berries and game are no longer to be found.

If we can agree here, this you will be able to say to the Blackfeet, and the Blackfeet will say, we will cut old bulls no longer, we will not starve, we will not die of cold, we will

do as you have done, we will be friends, we will chase the Buffalo together on the plains, we will be friends forever. [fol. 109] I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we do do it. If we think you have not done your part the agent will go to the cheifs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

I have much more in my heart to say but now, there will be time enough by and by; my brother Gen'l Palmer has to speak, he is your friend as I am but he has known you longer, and he can speak to you better than myself; he feels for you and you will find that every word which he says comes from a desire to serve you.

If you wish to hear him now he is ready to speak.

Gen'l Palmr Said. My friends, I do not wish to tire your patience too long, I have something to say to you, if you will listen a little longer I will speak.

My brother here speaks truly, when he says I desire to speak and act for your good.

In order to explain more fully the course pursued by the government towards the Indians on the other side of the mountains I will tell you of it; my brother here has reference to that subject and I may perhaps have to repeat his words.

He has told you something about our first settlements among the Indians over the mountains; those settlements were made over Three hundred and sixty years ago. First came a cheif with several of his brethren in three ships across the ocean, they found many Indians in that country who received them kindly, they gave to them food and received in return beads and various trinkets; that cheif after traveling over a great extent of country and visiting many villages left a part of his people and returned home.

After having been absent some time he returned with many others, upon arriving at the point where he had left his children none could be found. After the Chief left, these people began to quarrel among themselves and with the Indians.

There were many causes for this; a portion of the Indians whose hearts were not good, stole the property belonging to these people; the whites retaliated by whipping and ill treating them. That was the first offense on the part of the Indians; the whites had long been without women and they often took forcibly the women of the Indians; his induced them on their part to retaliate; these difficulties continued from bad to worse until finally there was war; our people were but few, the Indians many; our people were all killed; there were also many Indians killed. Upon seeing our Cheif return with his vessel and other vessels and so many people they fled; they knew they had done wrong as well as the whites, and they expected they would be punished for it; this time our Cheifs brot' with them their women and children and cattle and horses, and tools to work with.

The Indians seeing they were not interfering with them returned and for a while they lived together in peace; but they lived indiscriminately together, a white man here and an Indian there; but they could not long live thus; their customs and mode of life was different, they did not understand each other; they continued a number of years with little difficulties occurring, occasionally killing one another until it finally broke out with another war; peace would sometimes be made and last for a little time, but finally they would get foolish and their hearts would get bad; as it is [fol. 110] said in this country sometimes; in this part of the country by the young men they are few we are many let us wipe them out.

They finally made war, a council was held, speeches and harangues were made and they declared war, a few white men were killed and many Indians were killed; there were more Indians killed than white men because we had better arms and know how to make them. This war continued some time but finally they had peace; the whites brought with them and made after they arrived here whisky; this the Indians were very fond of and like all other persons after drinking it were foolish; they quarreled among themselves and killed each other and some whites in their drunken frolics; our cheif saw this conditions and desired to do them good; he saw that the Indians and the white man could not live peaceably together: he called the Indians together in council; he proposed as we propose in this council, to pur-

chase their country and select a place for them to live; he proposed to have a district of country set aside for the Indians to live in that no white man should live there; but the Indians said No! why should we leave the bones of our fathers and go to a strange land; we have plenty of elk, deer, bear, berries, and roots; we like you let us live together, we don't want to cultivate the soil you are welcome to occupy it; they were told that the wild game, the roots and the berries would not last always; they said they were a great and numerous people, they knew what was best for them and did not want our counsel; they quit talking,, the whites went to their houses and Indians to their lodges; our people continued coming; every year vessels came until our people got as numerous as the leaves on the trees.

It was but a few years before their game was all killed off; for the white man killed the game as well as the Indians; the Indians had no food in his lodges, the women and children were hungry; at last they commenced stealing our peoples property and plundering their houses; our people were forced to retaliate by whipping and shooting some of them. The Indians again sent messengers to the surrounding tribes to call them to make war; they resolved in council to exterminate the white, kill them off; they commenced by burning houses, murdering women and children, and killed a good many of our people; finally our warriors were collected and they had war; they did not understand our mode of warfare and thousands of Indians were killed and but few of our people were killed in the battles. This continued for a long time and the tribes finally concluded they had been acting foolish, and that they would receive the talk of our cheif.

Those that were left finally agreed to meet our cheif in council; they did so and there was peace. In that council it was agreed by the Indians that they would reside on a certain district, set aside for them certain limits, certain bounds; they agreed in that council to live in peace with the whites, and to commit no depredations on them, and to live at peace with other tribes; our cheif agreed that we would build them mills, black smith shops, carpenters shops and supply them with all necessary fixtures.

Our cheif directed his agents to build those mills and school houses and shops, and he employed teachers and smiths and millers and sent them among them. They sup-

plied them with cattle and horses and oxen and ploughs and waggons and every variety of farming tools.

These Indians then began to see that they had acted very foolish, and that when they supposed they knew enough for them and did not want any of our counsel, they knew nothing, they were as blind men; they have since been learning and continued to learn and prosper, and are now a great happy and good people; there were a few tribes who refused to go into that council, who refused to treat. What was the condition of that people? Those who thought themselves very wise and refused to take the advice of the white people those who continued to make war upon our people? Their game was all killed, they had nothing to eat, they fled to the [fol. 111] mountains then they continued to live but a few years of miserable existence, until they were finally overtaken by more powerful tribes and all killed. There were other tribes in other districts of country, who heeded the advice of the cheif and were set aside in districts of country belonging to themselves.

In all cases where they have entered into a treaty and agreed to reside upon tracts set apart for them our cheif has aided them. All who have settled upon these tracts have not done well, for they are lazy and have foolishly thrown away what has been paid them.

But you as a people know how to appreciate these advantages and would not throw them away; all experience we have had with Indians these Three hundred and sixty years shows us that the white man and the red man cannot live happily together; although we may live near together there should be a line of distinction drawn so that the Indian may know where his land is and the white man where his land is; you are all able to judge for yourselves by the constant difficulties that are occuring here among you, between the whites and the Indians.

We have some people whose hearts are bad, who violate our laws; we have men who are afraid to live in the settlements, they seek opportunities to go among people at a distance, among the Indians; as an evidence of that I need only refer to matters that have transpired within the past four weeks in your own country; a few men had formed a plot by which they were to get your horses: their plan was this: part of those men went over into your bands and if they

found any horse branded took a description of it, wrote it down in a book; when they had visited all your bands and got the description they would go away. Sometime after they would take their book and give one of their party a description of these horses and an order to get them; when they gather up all these horses they will drive them off to the Grande Ronde or some place in the Blue Mountains; they contemplate when they had got the stray horses coming back and drivin all your horses to Salt Lake; but a short time ago Mr. Thompson came up and learned the trick: he went below and took out a warrant for them and these soldiers came up to try to arrest them.

It is these men I am told who would rob you of your property, who are giving you advice not to treat with us; whose counsels do you prefer to take? These men who would rob you, or ours who come to befriend you? These men who came here are strangers to you with smooth tongues, they care nothing about the truth. I don't mean to say that all who come among you are bad men; I am afraid there are a few of these young men who come to live among you and wish to get your women, not because they desire your women but because they want your horses, they will come and remain among you a few years, get a woman and raise children, but when they get a band of horses around them, they will be off and leave the women and children without anything; I have been told that one of these men has been in your camp since we have been holding this council, advising you to have nothing to do with us; these men you cannot tell always who they are, but all such men need watching; you will now be able to judge who are your firends, such men, or myself and my brother who have come here to act for your good.

We have been talking a good while and you have been listening. You are tired sitting. I have more to say to you but I will leave it till tomorrow and say no more at present.

The Council then adjourned at 3½ P.M.

[fol. 112] In the evening the Young Cheif sent a message to the Commissioners to the effect that he should be pleased if no council should be held tomorrow, as his people desired to make a great Feast and have a general holiday. To which request the Commissioners acceded.

Lawyer, Pee-o-pee-mox-a-mox, Young Cheif and Cam-i-ah-kun dined at Gov. Stevens table with Gen'l Palmer and the gentlemen of the party.

June 1st. Friday.

All about the Treaty Ground was very quiet, all the principal Cheifs dined at Gov. Stevens table.

The day was extremely warm and to have held a council would have been most uncomfortable.

June 2nd. Saturday.

The Indians began to collect at 11½ A.M. Some delay was occassioned by the non appearance of Cam-i-ah-kun and Ow-hi. But at 12 P.M. all the cheifs being present the council opened.

Gen'l Palmer Said: My friends, we have met here today to continue the talk; I shall try and speak so that you may understand me.

I have said that the white man and the Indians could not long live together in peace, a few may do so, but where there are many we cannot do it. If your Cheifs are unable to restrain your people where there are but few, how can our Cheif prevent his people from doing wrong when they are so many and scattered over so large an extent of country.

It is but fifty years since the first white came among you, those were Lewis and Clark who came down the Big River– the Columbia. Next came Mr. Hunt and his party, then came the Hudson Bay Co. who were traders. Next came missionaries; these were followed by emegrants with waggons across the plains; and now we have a good many settlers in the country below you.

If there were no other whites coming into the country we might get along in peace; You may ask, why do they come? Can you stop the waters of the Columbia river from flowing on its course? Can you prevent the wind from blowing? Can you prevent the rain from falling? Can you prevent the whites from coming? You are answered No! Like the grasshoppers on the plains; some years there will be more come than others, you cannot stop them. Our cheif cannot stop them, we cannot stop them; they say this land was not made for you alone, the air that we breathe, the water that we drink was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains,

and the fowls of the air, were alike made for the white man and the red man.

Who can say that this is mine and that is yours? The white man will come to enjoy these blessing with you; what shall we do to protect you and preserve peace? There are but few whites here now, there will be many, let us like wise men, act so as to prevent trouble.

And now while there is room to select for you a home where there are no white men living let us do so. I have [fol. 113] made treaties with all the Indians tribes in the Willamette Valley, with all in the Umqua Valley, with all in the Rogue River and Shasta country; they have agreed to remove to such tracts as shall be selected for them; they have agreed to be friendly with the whites and all other Indians; they have sold us all their country except the reservations; we have agreed to build them mills, blacksmith shops, waggon makers shop, to erect a tin shop and gun smith shop, to build a school house and hospital, to employ millers mechanics, school teachers, doctors and farmers, all these expenses to be paid by the government for twenty years.

Do you want these things? Do you want a saw mill to saw the timber to build your houses? You have a few lodges now, how long will they last? by and by where will you get your hides to make lodges? Gov. Stevens told you that the Blackfeet said the Buffalo were not as plenty as they were once; it is but a few years since there were a plenty of Buffalo at Fort Hall. Mr. Craig here has seen many of them there and probably others of you have; where are they now? All gone;

Do you want mills to grind your wheat and your corn? Do you want blacksmiths to make your ploughs and harrows? to make your axes, hatchets, hoes, knives, and to shoe your horses? Do you want a gunsmith to mend your guns when broken? Do you want a tinner to mend your kittles, your pans and cups? Do you want a carpenter to build your houses and a waggon maker to make your waggons? Do you want a shoe maker to make your boots & shoes? Do you want a doctor to attend to the sick and give them proper medicines? Do you want farmers to assist you and show you how to raise wheat, corn and potatoes? Do you want school teachers to teach your children

how to read and write? Is it not good that these men can write down what is said here and understand what it is? It would make my heart glad if you could all do so. It would make my brother's heart glad if you could all do so; would it not be good if you wanted to talk with my brother or if you wanted to talk with our Great Chief? If you knew how to write and wanted to talk you could send it to him on paper and he would know your heart: would it not be good then to have schools among you?

Do you want to have plenty of provisions for your women and children? Do you want to have plenty of blankets and clothing? The deer skin and the elk skin cannot always be had to make your clothing; do you always want to live at peace with all persons? If you want all these things we are ready to give them to you; when we know your hearts then we shall know whether you want these things or not.

You have often been told that by and by our Great Cheif would send some person to buy your country. I suppose you have been looking for that person a long time; Dr. White came here. What did he do? He may have talked very well to you but what use? Mr. Wampool came, what did he do for you? My brother and myself have come, we have not only come to talk but to do something. Will you receive it or will you throw it behind you? We did not come here to scare you or to drive you away, but we came here to talk to you like men, and to make such arrangements as to preserve peace and protect you. Our agents have tried to protect you in all your rights: but I am fearful they will not always be able to do so, if you continue to live in this scattered condition.

I see here a good many old people. I expect you have left a good many of your old people at home; we want to do them some good while they yet live, and if you enter into a treaty with us we can then do them some good and do you all good; if we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place? My heart is that it is better for you to enter into a treaty now with us. I know that my brother has a good heart and wants to do you good, but we do not know how long we can act for you. Perhaps it may not be long before other agents

[fol. 114] will come; the next that come may not have such good hearts and do as much for you as we will.

If we make a treaty with you and our Great Cheif and his council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Gov. Stevens Said. My Children, my brother and myself have opened our hearts to you , we want you to open your hearts to us.

Five Crows Said, we are tired.

Gen'l Palmer Said. We are not expecting to say any more today.

Five Crows Said. I have a little to say. Do you speak true that you call me brother? We have but one Father in Heaven; it is He /pointing above/ who has made all the earth; He made us of earth on this earth: He made our Fathers; when he gave us this earth. He gave no gardens also.

He created our Fathers when he created Adam; we were divided into different countries; It was He, the Almighty that passed the law; He is the same God that made the Ten Commandments; He said my Children you must do no evil, you must not steal, you shall not take any thing without payment; the Great Father says he will send the thief into fire—into hell—

The Commissioners said will you speak now or on Monday?

Pee-o-pee-mox-a-mox Said. Why not speak tomorrow as well as today? We have listened to all you have to say and we desire you should listen when any Indian speaks. It appears that Craig knows the hearts of his people, that the whole has been prearranged in the hearts of the Indians; that he wants an answer immediately without giving them time to think; that the Indians have had nothing to say so far it would appear that we have no cheif.

I know the value of your speech from having experienced the same in California, having seen treaties there. We have not seen in a true light the object of your speeches; as if there was a post set between us, as if my heart cried from what you have said; as if the Almighty came down upon here this day; as if He would say, What are you saying? Look at yourselves your flesh is white mine is different, mine

looks poor; our languages are different. If you would speak straight then I would think you spoke well; we have come together to speak about the earth and not of God; you were not afraid of the Devil!

You see this earth that we are sitting on; this country is small in all directions. Why should you fear to speak on Sunday? Should I speak to you of things that have been long ago as you have done? The whites made me do what they pleased, they told me to do this and that and I did it? they used to make our women to smoke; I suppose then they did what was right: when they told me to dance with all these motions that are here then I danced. From that time all the Indians became proud, and called themselves Cheifs.

On another subject I have something else to say. Now how are we here as a post? From what you have said I think you intend to win our country, or how is it to be? In one day the Americans become as numerous as the grass; this I learned in California; I know that is not right; You have spoken in a round about way; speak straight. I have ears to hear you and here is my heart. Suppose [fol. 115] you show me goods shall I run up and take them? That is the way we are, we Indians, as you know us. Goods and the Earth are not equal; goods are for using on the Earth. I do not know where they have given lands for goods.

We require time to think, quietly slowly. I see Americans in all countries, it is not the country to think about, we may think about another; there is the Mission /Catholic Mission/ it is right there and it is right it should be there. You have spoken in a manner partly tending to Evil. Speak plain to us. I am a poor Indian, show me charity; if there was a cheif among the Nes Perses or Cayuses, if they saw evil done they would put a stop to it and all would be quiet; Such cheifs I hope Gov. Stevens and Gen'l Palmer are. I should feel very much ashamed if the Americans should do anthing wrong. I had but a little to say, that is all. I do not wish you to reply today, think over what I have said.

Com-os-pi-lo- Said in substance as follows, it was addressed to his people and rendered by the Interpreters after the conclusion of his speech.

He reproved the young men for laughing and talking: said they considered him of no account any longer; they had knocked off his horns and his teeth were worn out; once he had horns and he could hook; teeth and they were sharp and he could bite; you young men think yourselves very smart by and by you will learn; now I am tired of your conduct; I am not speaking to Gov. Stevens or Gen'l Palmer, I am speaking to you young men, as my children, to listen and behave yourselves.

Gov. Stevens Said. We are ready to hear, my friends anything you have to say today. If you desire not to speak today the council will adjourn till Monday. We do not wish to speak on Sunday because our Great Cheif does not want us to do business on that day, unless it is a matter of necessity. We think that most of our red brethren do not wish to do business on Sunday. The Council is adjourned till Monday at 10 A.M.

And the Indians then dispersed at 3 P.M.

June 4th at 12½ P.M. the Indians began to collect and 1½ P.M. the council opened.

Gov. Stevens Said. Pee-o-pee-mox-a-mox said on Saturday, he had listened patiently to all we had said, and hoped we would listen patiently when any Indian spoke. We listtened patiently on Saturday, we shall listen patiently today; we want you to open your hearts and speak freely.

After a long pause the Lawyer said. If you will designate some one to speak first he will speak. If you do not they will sit here all day without speaking.

Gov. Stevens Said. We expect the Head Cheifs know the hearts of their people. We will be glad to hear the lawyer speak.

The Lawyer Said. My Cheifs and people, I will now speak, listen (to Commissioners) I ask good for these poor people; I thing my cheif about what you have been speaking; It is from the man that made us, My Cheif, or is it from your own people? that is the reason of my asking, where is it from you have spoken My Cheif? Although I think it is from the white people; from where the white people is they have been dying and dying, and are yet dying, and also the whites are living all from the same people. The same thing of our [fol. 116] people our red people that are younger and from

the same root; and here you see these many of us yet and still living, old men and children.

The Supreme Being our maker listens to the white people who are dead and also to those who are living; the same thing with the red people, they listen to the dead and also the living.

And this what the President has made up his mind for us poor people; he has thought were a poor people and says go and see them and learn them straight; and this is the reason you have told them you would learn them to read and write and all those other things you have spoken of; and that is the reason I have understood what you have spoken from the President: for that reason you have been asking us questions, and now we are asking questions from you.

It was not for nothing I have been listening to you. My country is poor it is a trifling country. You see the map the marks of our country, one stream runs one way another runs another way, it is all rock. My Cheif, but the Big Cheif from the light (the East) said to you go and talk to these people and you have done it, he says go there to take care of your white people and your red people and you have done it. As long as the Earth stands take care of the people; he said to the white people and the red people all as one let us listen to the laws, when the earth is done away with there is the end of the law, and that is the reason you see us good and we see you good.

My Cheif that is all I have to say at the present, there are a good many men here who wish to speak. Let them speak.

The Commissioners requested Pe-at-tan-at-tee-miner to speak, who replies. You have heard what I have to say. My mind is the same as the Lawyer has spoken. What I had to say he has said, he has spoken my mind, I have nothing to say, he has said all, for my land it is for you and for me. I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking. This is all I have to say at this present time.

Cam-i-ah-kun was invited to speak and said. I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man their doings are different from ours. Your cheifs are good,

perhaps you have spoken straight, that your children will do what is right, let them do as they have promised. This is all I have to say.

Pee-o-pee-mox-a-mox was next invited and said I do not wish to speak. I leave it to the old men.

Gen'l Palmer Said. We do not know who of them desire to speak; let their old men speak if they desire to do so.

Gov. Stevesn Said. If u-u-Sin-mull-e-cun would like to speak we would be glad to hear him. He replied. I do not wish to speak now let those who have already spoken speak. What the Lawyer has said is my heart, it is not necessary for me to speak.

The Commissioners called upon Staachas to speak who said, how is a cheifs language? How is the Big Cheif talk? Where has their talk sprung from? That they have spoken straight on the part of the Indians; the Lawyer although young has spoken well for me. Who is it that is going to speak straight for all of us. Now I want the whites and the Indians to show all their hearts; you know and we all know life while we are living, and I ask you my friends to speak straight and plain to us, as if I spoke to the President I say Yes. I would wish that the President was here so that we might all listen to him; he would enlighten us, he would give [fol 117] us life, he would make us to live as we ought to live, we would give each other our hands to hold always.

Lawyer spoke first and he will have more to say about this we are now speaking of. Lawyer has asked you to speak plain. I make the same request. I have nothing more to say.

Pee-o-pee-mox-a-mox Said. I do not know what they (the interpreters) have said. My heart was heavy, my heart has to separate so, that was my heart. I do not know for what lands they (the interpreters) have spoken. If they had mentioned the lands that had spoken of then I should have understood them. Let it be as you propose so the Indians have a place to live, a line as though it was fenced in, where no white man can go.

If you say it shall be so then all these Indians will say yes Although that you have said the whites are like the wind: You cannot stop them, you make good what you have promised.

You have spoken for lands generally. You have not spoken of any particular ones, your words are here (at this place). If you spoke as the watch goes, then we would say yes; the manner in which you have addressed the whole of us had made my heart heavy. I had nothing to say: I like you Americans; and I like the Hudson Bay Co. people by which means I am led this way and that way; I do not know as yet what lands these Indians have spoken for but when they mention the lands then I shall know.

Fah-hah-tsil-pilp or the Red Bear said: I am not ashamed of any of my friends, for why should I be ashamed? If there was something above that I should be ashamed of, then I should be ashamed; I am not ashamed of any people that are sitting around, we have spoken here with our brothers. This is the first time I have ever seen my brothers here.

I like your talk very much as I have heard it, and that is the reason I have listened to you well. And here where we see each other face to face we will talk straight. We shall know if you shall like my talk that I am now talking as I have like yours. I wonder if we shall both tell the truth to each other.

This is what I think my Brothers, that one time more we will talk, we will not say yes from what has yet been said.

Now my younger brother there will speak. Being thus called upon.

Tip-pee-il-lan-ah-cow-pook, or the Eagle from the Light arose and said: Yes my friends you see where the Sun is. He hears me. It is from beyond where the Sun is that sent you here to talk.

The red people are put on this earth. A white man was sent on this earth from the Light (meaning the East). The red man was sent from the West, and now the big cheif from the Light has sent his talk here to the red people.

The President has spoken to me through you and I hear it. He likes us. He has fixed places for us to sit on and love one another. And I also like the white people as the President likes us.

On a road ready finished, he has sent you here. Look at the face of the earth, there is a road to travel on. Roads up the valleys and roads on the the end of the earth. From the time you started, you found a road till this time.

You are now come to join together the white man and the red men.

[fol. 118] And why should I hide anything? I am going now to tell you a tale. I like the President's talk; I am glad of it when I hear it here and for that reason I am going to tell you a tale.

The time the first white men ever passed through this country, although the people of this country were blind, it was their heart to be friendly to them. Although they did not know what the white people said to them they answered yes, as if they were blind. They traveled about with the people as if the people that said that had been lost, and those lost people said to them, yes.

I have been talked to by the French and by the Americans, and one says to me, go this way, and the other says go another way; and that is the reason I am lost between them.

A long time ago they hung my brother for no offence, and this I say to my brother here that he may think of it.

Afterwards came Spalding and Whitman. They advised us well and taught us well, very well. It was from the same source, the Light (the East). They had pity on us and we were pitied. And Spalding sent my Father to the East—the states—and he went. His body was never returned. He was sent to learn good counsel and friendship and many things. That is another thing to think of.

At the time, in this place here, when there was blood spilled on the ground, tho there was blood upon the earth we were friendly to the whites and they to us. At that time they found it out that we were friends to them. My cheif, my own cheif said, I will try to settle all the bad matters with the whites and he started to look for counsel to straighten up matters; and there his body lies, beyond here. He has never returned.

At the time the Indians held a grand Council at Fort Laramie. I was with the Flatheads and I heard there would be a council this side, next year. We were asked to go and find counsel, friendship and good advice. Many of my people started and died in the country. Died hunting what was right. There was a good many started there on Green River, the small-pox killed all but one. They were going to find good counsel in the East; and here I am looking still for counsel, and to be taught what is best to be done.

And now look at my peoples' bodies scattered everywhere hunting for knowledge, hunting for someone to teach them to go straight.

And now I show it to you, and I want you to think of it. I am of a poor people.

A preacher came to us, Mr. Spalding. He talked to us to learn, and from that he turned to be a trader, as though there was two in one, one a preacher and the other a trader. He made a farm and raised grain and bought our stock, as though there was two in one; one a preacher the other a trader.

And now from the East has spoken and I have heard it. And I do not wish another preacher to come and be both a trader and preacher in one. A piece of ground for a preacher, big enough for his own use, is all that is necessary for him.

Look at that, it is the tale I had to tell you, and now I am going to hunt friendship and good advice.

We will come straight here–slowly perhaps,–but we will come straight.

[fol. 119] Gov. Stevens said: My brother, if any of you wish to speak today, I will still be silent. Is there anyone who wished to speak now? If not, I will go on. We have listened to you carefully. We think we know your hearts.

You are willing to make a bargain. You want to know exactly the terms. We have promised mills, ships, schools, teachers, farmers, and all the other things for a term of years. You want to know how many years. We have promised you as the other part of the payment clothing for yourselves, your wives, and your children; tools and implements for your farms and shops and articles for your home.

You want to know how much clothing. How many implements and tools and articles for your farms, your shops, and your houses; and how many years will you have them?

Before I answer that, I will answer another question which you have asked me. You want to know where your Reservations are to be. What is the ground we have in view for you. I will explain this matter freely.

Here are Nes Perses, Cayuses, Walla Wallas, Yakamas and Umatillas and bands on both sides of the Great River to below the Dalles.

Tribes northwards: Colvilles, O-kin-kune, Palouse.

For the principal tribes here present, we have thought of two Reservations. One Reservation is the Nes Perses country and one in the Yakama country. The Reservation in the Nes Perses country, to extend from the Blue mountains to the spurs of the Bitter Root, and from the Palouse river to part way up the Grande Ronde and Salmon River.

On this Reservation we wish to place the Spokanes, the Cayuses, the Walla Wallas, as well as the Nes Perses, and also the Umatillas. That will be something for them to think about to see whether they can agree to it.

The Yakama Reservation to extend from the Attannun river–to include the valley of the Pisco river–and from the Yakama river to the Cascade Mountains. On this Reservation we wish to place the Colvilles, O-kin-a-kunes, Palouse, Pesquouse, Klit-a-tats, and the bands on the north side of the river below the Walla Wallas as far as the Kuth la poodle river, near the Cowlitz. All these as well as the Yakamas on that Reservation.

There is a third Reservation East of Mr. Jeffersons which will be explained to you by Gen'l Palmer; there it is proposed to place the band below the Umatillas.

We want you to think about this and see if you like it. You may think the Reservations are not good. If not you will say so. The Cayuses, the Walla Wallas, the Umatillas, may prefer the Yakama to the Nes Perses Reservation, and they may not like either.

I will give briefly the reason for selecting these two Reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on each Reservation. There is plenty of Salmon on these Reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to market.

Though near to the great roads, you are a little off from them, and you will not be liable to be troubled by travellers passing through.

[fo. 120] We can better protect you from bad white men there. We can better prevent the trader and the preacher all in one man going there. We can better prevent bad men

telling you to dance, and cheating you with lies. We can better stop the theif who comes to steal your horses. Your horses will be saved to you and there will be no theives to throw into hell-fire.

You may aks, why so many tribes on one Reservation, and how is it proper to place them on the Reservation?

We want as many tribes together as can be taken care of by one agent. We can do more with the same means; this is a matter I wish to explain fully, and also about the payment in clothing, etc., which I mentioned in the first part of what I said, I will speak no more today, but speak tomorrow. Think over what I have said and hear the rest tomorrow.

Gen'l Palmer said: I shall say nothing to you tonight. You have been sitting a long time and you are tired. We want you to come tomorrow morning early. We want you all to come. You have heard but part, we want you to hear the whole, and when you hear all I think you will say it is good. I have nothing more to say tonight.

The Council then adjourned at 6 P.M.

June 5th, Tuesday.

The Indians began to collect 11½ A.M. and at 12 P.M. the Council opened

Gov. Stevens said: My Children, I stated yesterday that we wished to place you on two Reservations and that as regards the tribes below the Umatillas. There was a thrid Reservation which would be explained by my brother, Gen'l Palmer. I stated we wanted as many tribes as could be taken care of by one agent.

I will now explain this matter more freely. We wish to put the Spokanes, the Nes Perses, the Walla Wallas, the Cayuses, the Umatillas on one Reservation in the Nes Perses country.

Here (showing a draft on a large scale) is a map of the Reservation. There is the Snake River. There is the Clear Water River. Here is the Salmon river. Here is the Grande Ronde river. There is the Palouse river. There is the El-pow-wow-wee.

We commence where this river, the Palouse, comes from the mountains, and down the river to the mouth of the Ti-not-pan-up, then to the Snake river 10 miles below the mouth

of the El-pow-wow-wee, then to the source of the El-pow-wow-wee, Thence along the crest of the Blue Mountains to the Grande River below the Grande Ronde, thence along the ridge between the Wall-low-low river crossing the Snake River 15 miles below the mouth of Powder river, thence to the salmon river a little above the crossing, thence by the spurs of the mounatins to the source of the Palouse river at the place of beginning.

This is a large Reservation. The best fisheries on the Snake River are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-wa-wee, and the other streams. There are cumash grounds here at this place (pointing to the large cumash grounds of the Nes perses). We feel if we put you on this Reservation our agent can visit you all and take care of you all.

[fol. 121] Each tribe will have its own place on the Reservation. The Spokanes will have their place and their home. The Nes Perses their place and their home. The Walla Wallas their place and their home. The Cayuse and the Umatillas their place and their home.

The Spokanes will have a blacksmith, a school, and a farmer. The Walla Wallas will have a blacksmith, a school, and a farmer. The Cayuse and Umatillas willhave a blacksmith, a school, and a farmer. The Nes Perses are more numerous they will have two balcksmiths, two schools, and two farmers.

These schools are the first schools where your children will learn to read and write. The agent will live in some central place where there will be an agricultural and industrial school common to all the tribes. To this school all the tribes will send such of their children as wish to study more than in the first schools, and to learn trades. Here where the agent lives will be the tinner and tin shop. There will be one for all the tribes. There will be the waggon maker and wheel right; there will be one for all the tribes.

For the four tribe there will be two saw-mills and two flouring milles in proper localities. Thus all the tribes will be on a an even footing, and each will have the same provision made for them.

You will see that you will be better taken care of all on

one reservation; each tribe having its own place, than if the Spokanes were on one reservation with the whites all around them. the Nes Perses on one reservation with the whites all around them, the Cayuses and Umatillas on one reservation with the whites all around them.

Here (showing map) you will be on one Reservation with equal rights under one Agent, and the same provisions for your welfare. But each tribe has its head chief. A chief takes care of his people. His people listen to him. He devotes his time, his very life to their good. We want your cheifs to be such men, we expect them to know about you and to see that we do our part. They will not work for themselves, they will work for you. We shall therefore give the Head Chief of each tribe Five Hundred Dollars a year for 20 years to be paid in cash.

We shall build for each Head Cheif a good house to live in. The Agent will have his house and he will be paid. The Head cheifs shall have their houses and be paid. They will all labor for the good of the Indians.

You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

My friends, I have held four councils on Puget Sound. I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have all agreed, should the President decide, to go on one Reservation. That Reservation is only about one fifieth part as large as this; they have, however, a few horses and cattle. They have not three hundred head. They take Salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more.

Now I will tell you the payments that will be made provided you are placed on one Reservation. If you go on different reservations different provisions will be made.

Well, you all go on one Reservations, Spokanes, Nes Perses,

Walla Wallas, Cayuses and Umatillas; we shall spend a [fol. 122] certain amount in moving you onto the Reservation, in breaking up and fencing your farms, in building houses for your cheifs, your sub-cheifs and your people, in cooking utensils for your houses, in milk pans and churns, in a good supply of blankets and clothing. In all these things we will expend for you, One Hundred Thousand Dollars. This will be done the first year you go on the Reservation.

Now, if any man gives up a tract of land in going onto the Reservation, he will have the same thing done for him that is done for all the rest and he will have, in addition, his improvements made good to him on the Reservation or the value of them paid to him in cash, as he may desire.

The other payments extend through twenty years. Two Hundred and Fifty Thousand Dollars. We do not want to spend this amount or much of it in cash, and I want my friend Pee-o-pee-mox-a-mox and the other cheifs to listen while I give the reason. I ask all the cheifs to hear my reasons and think of them .

We can furnish you with nearly twice as many goods with the same amount of money as you can get from the Traders. We shall buy the things you want in New York and San Francisco at cheap rates and good articles. The expense of getting them to you will not come out of your money; it will cost you nothing. You now pay Eight or Nine Dollars for a blanket at Fort Walla Walla, we shall furnish you two such blankets for less than that sum, say from six to seven dollars. At Fort Walla Walla a flannel shirt costs three dollars, we will give you three shirts for three dollars. You pay for a calico shirt at Walla Walla one and a half cents a piece. If we furnish the goods therefore, you will get three blankets, three flannel shirts and three calico shirts for the same money you now pay for one blanket, one flannel shirt, one calico shirt, and have to make a long journey for them besides. We can furnish four hoes for a dollar and a half. You know what you have to pay for a single hoe at Fort Walla Walla and the Dalles. We

want the payments to do as much for your good as possible. We don't want half of it go into the pockets of Traders.

I ask the cheifs to listen to me again.

There will be a certain sum each year for their people. We want them each year to consult their people and tell us what things they want. We want them to make out a list how many blankets they want and what kind of blankets, the number of flannel and calico shirts they want, and so for every article of clothing for their men, women and children. Also the tools they want for their farms, their house and their shops. In short we want the cheifs to tell us how they want the money spent. The list to be made out every summer for the pay of the next year. If you want part of the pay made in money we want you to give the reasons and state the sum each year. We will send your reasons to the President and let him decide. There are many of you we would be willing to give a part of the payment in money, but not to the men who drink whiskey, and not to the men who do not take care of their wives and children. Let, therefore, your cheifs each year make out a list of how much money and we will send it to the President.

I have now a few words to say in regard to the Yakama Reservation; the same provisions as regards schools, farms and shops will be made, as in the case of the Nez Perses Reservation.

Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the Cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.

[fol. 123] We propose to place there the Colvilles, the O-kin-a-kunes and Pisauouse Indians (they now send their cattle and horses there in winter), also the Bands on the Columbia River below the Walla Wallas down to the mouth of the Kuth la poodle river, also the Klicatat around Mount Adams and Mount St. Helens. These Klicatats and these bands on the Columbia originally came from here or further north.

We will give one blacksmith, one farmer and one school for the Colvilles, one of each for the Pisquouse and O-kin-a-kunes, one of each for the Yakamas, one of each for the Yakamas including the Palouse, one of each for the remaining bands. They shall have the agricultural and industrial school as in the other Reservation. They shall have the same mechanics, gunsmith, tinsmith, plough and waggon makers. There children shall be taught and they shall learn trades like the children on the other Reservation. They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites. to kill game, to get berries and to go on the roads to market. Payments to be made in the same way as in the Nes Perses Reservation. One Hundred Thousand Dollars to be expended the first year. Two Hundred and Fifty Thousand Dollars, the next twenty years.

I need say nothing more. It is designed to make the same provision for all the tribes and for each Indian of every tribe. The people of one tribe are as much the people of the Great Father as the people of another tribe; the red men are as much his children as the white men.

We think this plan will be for your good. We want you to think of it. I have tried to talk plain and to speak straight out. My Brother will now speak.

Gen'l Palmer Said. My Brothers, my brother here has said as much perhaps as could be said. He has told you what we desire to do for you; it is for you to say whether you will receive it or throw it away; we have but one heart; he has been speaking of something which interests you; it is the duty of your cheifs and your men to think well of it. It was said by this man (Young Cheif) the other day that we were not acting wholly for these that are here now, but for those who come after us; it is the duty of a parent to provide for his children. You may not understand all the advantages of the propositions that have been made to you; but they are for your benefit and those who come after you; as a cheif desiring to promote your interest, I say it is good; that I would not deceive you; the Great Spirit who knows the hear of all men knows that I desire to promote your good.

We expect it will take at least two years to prepare these reservations for you to go onto. If we make a bargain and

sign the papers, my Brother and myself and all the Head Cheifs and Head men, that paper must go to Washington. Our Cheif and his council will examine it; if they approve it they say yes, and give us the money to expend in accordance with its provisions.

My brother has stated that you will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements cast of the mountains to our settlements here; they may desire to run that road through your Reservation; if we desire to do so we wish that privilege; that kind of road we call a railroad. I will try and explain to you the way in which we make such roads. We first lay on the ground sticks of timber, we then lay other sticks across in that way, unite them together and put a strip of iron on the top of them, we then place a waggon on those tracks and instead of having horses or oxen hitched to the waggon we build a fire; some of you have seen a steamboat; they have on this waggon a boiler filled with water, the fire heats the water and produces [fol. 124] steam, which propels the machine. I am unable to explain all the machinery or the way in which it works but they will travel faster than your swiftest horses can run, all the time. If we start from here at sunrise we can be at Wascopen by the middle of the day. We sometimes attach twenty of those waggons together and one of those Engines draws the whole, they will take waggons enough to draw more people than are here. We call the waggon in which they have the fire and water a Locomotive: I have rode on those waggons many a time so have our people here all or nearly all of them. Now if our cheif desire to construct such a road through your country we want you to agree that he shall have the privilege. You would have the benefit of it as well as other people.

We have another improvement that I wish to speak to you about, it is called Telegraph. We may possibly desire to make such an improvement through your country. We set posts into the ground 15 or 20 feet high, and as far from here as that house; when the posts are set we place a wire on the top about as big as that; this wire extends as far as we wish to make the road if it is 100 or 1,000 miles.

If my brother is at Oregon City and desires to speak to

the Great Cheif he speaks to him if the wires extend that far; the man at the other end of the land will know what he says as quick as I who stand beside him; if the instrument which is attached to this wire should be in you country an a man should steal your horse, and you desired to send word to the Willamette Valley, you would tell this man and he would work the machine and the man in the Willamette would understand you had lost a horse, and before the thief could reach there they would know it, arrest him before he came. You may not understand them now, but when you know as much as the white man you will.

Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for your injury.

I told you yesterday I would explain to you another Reservation, but that Reservation is for the people who live below here; there are but few of them here; and as I expect to hold a council with them when I return, and as that Reservation does not particularly interest you, I need not explain it now:

Now I want you all to talk among yourselves and think about what has been said to you, and I want you to think of it like men. When you think of it, if you say that what we have said is good and that you receive it, you can express it to us and we can soon write out the Treaty.

You are now tired you have been long time sitting, you know our hearts, and if there is anything you do not fully understand before you make up your minds come and inquire and we will explain. If any of you wish to speak now we will listen to you. Or if you can make up your minds so as to give us an answer this evening come and do so and we will be ready to receive it.

Stachas Said. My friends, I wish to show you my mind, interpret right for me. How is it I have been troubled in mind? If your mothers were here in this country who gave you birth, and suckled you, and while you were sucking some person came and took away your mother and left you alone and sold your mother, how would you feel then? This is our mother this country, as if we drew our living from her.

My friends, all of this you have taken. Had I two rivers I would be content to leave the one and live on the other.

I name three places for myself, the Grande Ronde, the Touchet towards the mountains and the Tucannon.
[fol. 125] That is all I have to say.

After a long pause–

Gov. Stevens Said. My brothers, if you do not feel inclined to speak today, we will come together again tomorrow.

We want the cheifs and the people to speak freely as Stachus has done. We will think of what Stachus has said. We could give our reasons now but we are all tired. We will tomorrow after you have spoken, state what we think. Come early in the morning and let us see if we cannot agree before night.

The Council is adjourned till 9 o'clock tomorrow.

Five Crows Said. I am as it were without thinking yet. I require time to think and then I will answer.

Council then adjourned at 4½ P.M.

Thursday, June 7th

Council met pursuant to adjournment–at 12 o'clock– Present as before.

Gov. Stevens Said. My brothers we expect to have your hearts today, let us have your heart straight out.

Lawyer Said. My friends you have been speaking to me a poor people. This Earth is known as far as it extends. This earth has red people on it and it has had as far as it extends. The people are lost, they don't think whose talk has come to us poor people. On the other side of the big water there is a large country. We also know that towards the east there are a great many different kinds of people: there are red people and yellow people and black people, and a long time ago the people that travelled this country passed on the waters. And there is that country on that other side of the big water and here is this on this side. On the other side of the big waters they have their laws. Yes. they have their laws there. We now hear the laws they have there, and we now know they have those laws there. We also know the white people pass about on

the waters as they wish to. I do not know what they find in travelling about on these waters or what they are hunting, whether it is timber, leaves, grass or what. It was the Spaniards in that direction that just travelled about in their ships, they were the ones who first discovered this country and it was in that way they travelled to look for things, in that way they travelled when they found this country; the red people that along the shores to the big waters, those were the people, and at this place they landed to see those poor people. At that place the red man started and run off, or a part of them did because they did not know the people who came to see them, and the rest come and met them, there is where the white people first placed their children when they first come into the land. From this country they took back samples of rich earth, of flowers, and all such things; they also reported that there was a country on the other side, and it was peopled and these people reported they had found a country. And it was known that there was a new country found. And one of the head men said. I knew there was a country there before. Columbus the discoverer said Can you make an egg stand on end. Although he tried he could not do it, he did not understand how, it fell over: then Columbus showed them all that he could make it stand, and he did it, he made the egg stand. After they saw it done they could all do it.

Those children that he had placed in this country among the red people, from them the blood ran on both sides: that is when the laws come into this country to those poor [fol. 126] people: there were a great many white people come back to that place; that is the reason the red people travelled off further and from that they kept still travelling on further as the white people came up to them and this man's (Delaware Jim) people are from the same people: they have come till they are here to us now, and from that country some central part came Lewis & Clark, and that is the way the white people travelled and came in here to my forefathers. Where they came into our country they named that stream Kooskooski: it was then they knew us poor people. They passed through our country and knew all our country and all our streams, and on their return my forefathers used them well: as well as they could.

From the time of Columbus and from the time of Lewis & Clark we have known our friends: we poor people have known you as brothers although we were a poor people, a people knowing nothing when we first saw the white cheifs Lewis & Clark. From these poor people there were some of them that started in that direction (east) and of these there is only one now living (Spokane Gerry) they want to be taught, they returned after they could see a little and told us about the Great Spriit; they told us the laws for the poor people; they had seen and heard them My Chief said our old laws are poor, the new laws we are getting are good laws, are straight. We said there were these laws, the laws of the Commandments; our old laws the laws of our forefathers and the new laws we are getting shown to us and when the French and American traders first came to us they told us there were laws and those laws should be sent to us.

Ellis our Chief spoke strait for the white people, the President has sent you here to us poor people. Yes! the President has studied this and sent you here for our good. That is the reason I said on Monday use us well my Cheif we are a poor people.

The Governor has said the President has sent him to take care of his children: it was you that had spoken thus my brothers (Gov. Stevens and Gen. Palmer) I want the President to see what I a poor man has said. I have got your talk here (pointing to his notebook) and although a poor man I can look at it from time to time. I can take care of that; my brother, we have been talking along time and are all tired.

I think on the stream just below where Mr. Craig lives will be a good place for one mechanic or on one of the ranches you have shown me. I also think that perhaps in the country where I live may be good place for some more of them, in case they were crowded below it would be good place where I live.

Now my friends I have spoken; those things that have been talked of, you know, I have shown you my heart. You have said to them all you had to say. I have also given you all I had to say.

Then my friends I have spoken; those things that have been talked o you know. I have shown you my heart. You

have said to them you have said all you have to say. I also have said also all I have to say.

You spoke of a road through my country (the Reserve) it is a bad country, to make roads in, but perhaps it may go through, that is the reason I think we have both talked. 'Tis all our talk. Our Father Chief has said take care of one another. There is no reason that I should speak long although I have more to say. That is the reason I say take care of us well: that is all I have to say at this time, my bretheren. I will have one word more to say when we are about to part.

Gov. Stevens. We have the heart of the Nes Perses through their Chief, their hearts and our hearts are one. We want the hearts of the other people through their Chiefs.

[fol. 127] Young Cheif. Us Indians are blind the reason we do not see the earth well, the Lawyer sees clear. The reason that I do not know anything about this ground is I do not see the offer you have made us yet. If I had the, money in my hand then I would see: the country is very large is the reason this land is afraid. I wonder if this ground has anything to say: I wonder if the ground is listening to what is said. I wonder if the ground would come to life and what is on it: though I hear what this earth says, the earth says, God has placed me here. The Earth says, that God tells me to take care of the Indians on this earth; the Earth says to the Indians that stop on the Earth feed them right. God named the roots that he should feed the Indians on: the water speaks the same way: God says feed the Indians upon the earth: the grass says the same thing: feed the horses and cattle. The Earth and water and grass says God has given our names and we are told those names: neither the Indians or the Whites have a right to change those names: the Earth says, God has placed me here to produce all that, grows upon me, the trees, fruit, etc. The same way the Earth says, it was from her man was made. God on placing them on the Earth during then to take good care of the earth and do each other no harm. God said. You Indians who take care of a certain portion of the country should not trade it off unless you get a fair price.

I am as it were, blind. I am blind and igornant. I

have a heart but cannot say much, that is the reason the Chiefs do not understand each other right. They stand apart. Although I see your offer before me I do not understand it: Lawyer understood your offer and he took it I do not understand it and I do not yet take it: I walk as it were in the dark and cannot therefore take hold of what I do not see. Lawyer sees and he takes hold. When I come to understand your proposition then I shall take hold. I do not know when. 'Tis all I have to say.

Five Crows said. I will speak a few words. My heart is must the same as the Young Chief.

Gen. Palmer. We know no cheif among the Walla Walla but Pe-pe-mux-mux; if he has anything to say we should be glad to hear it.

Pee-pee-mux-mux. I thought these Indians were all the same as one, all alike (adressing the Indians he said). Why do you speak to one another? Listen to me. That is the way with your Chiefs, you white people. When you show us something then we think it good, treating us as children, giving us food. I do not know what is straight. I do not see the offer you have made to the Indians. I never saw these things with my father. My heart cried very hard when you first spoke to me, the same as if I was a feather. I flew, then I thought the same as if you were talking to a feather. I thought what will I do? I have seen everything on both sides of the river. You are all talking together, we are all talking together. If you were to separate as we are now and appoint some other time we shall have no bad minds. Stop the whites from coming up here till after this talk, not to bring their axes with them, the same as if I say my heart above.

I hope the President will not think I say or mean anything bad, there is no difficulty in sending letters about: this that I have said to you I do not know in what light you have taken it, whether I have spoken straight or wrong. The whites may travel in all directions through my country we shall have nothing to say to them providing they do not build houses on our land. Now I will speak about Lawyer.

I think my friend has given his lands, that is what I think from his words. You hear both of you what I say—it is only that I request another meeting, whenever it shall be. It is

not only by one meeting that we can come to a decision. I have listened to you in a friendly way. If you come again with a friendly message from the President I shall see them at his place, tomorrow I shall come to [fol. 128] see you, and towards evening I shall go home. You have spoken to us in a friendly way and I speak to you in the same way, slowly. Gov. Stevens and Gen. Palmer I cannot give you a direct answer, perhaps you will not think well of mywords. I beg you will leave me in this way for today. Tomorrow I will give you answer. I do not know; that is all I have to say.

Gen. Palmer. I wish to say a few words to these people, but before I do so if Kam-i-ah-kan wished to speak he can do so.

Kam-i-ah-kan Said. I have nothing to say.

Gen. Palmer. I would inquire whether Pe-pe-mox-mox or the Young Cheif speaks for the Umatillas. I wish to know if they are of the same heart.

Owhi. I have nothing to say about this land today. God gave us day and night, the night to rest in and the day to see, and that as long as the earth shall last, he gave us the morning with our breath; and so he takes care of us on this earth: and here we have met under his care. Is the earth before the day or the day before the earth. God was before the earth, the heavens were clear and good and all things in the heavens were good. God looked one way then the other and named our lands for us to take care of. God made the other. We did not make the other, we did not make it, he made it to last forever. It is the earth that is our parent or it is God is our elder brother. This leads the Indian to ask where does this talk come from that you have been giving us. God made this earth and it listens to him to know what he would decide. The Almighty made us and gave us breath: we are talking together and God hears all that we say today. God looks down upon his children today as if we were all in one body. He is going to make one body of us: we Indians present have listened to your talk as if it came from God.

God named this land to us that is the reason I am afraid to say anything about this land. I am afraid of the laws of the Almighty, this is the reason I am afraid to speak of the land. I am afraid of the Almighty that is the reason

of my hearts being sad: this is the reason I cannot give you an answer. I am afraid of the Almighty. Shall I steal this land and sell it? or what shall I do? this is the reason that my heart is sad.

My friends, God made our bodies from the earth as if they were different from the whites. What shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute? Shall I say I will give you my lands? I cannot say. I am afraid of the Almighty. I love my life is the reason why I do not give my lands away. I am afraid I would be sent to hell. I love my friends. I love my life, this is the reason why I do not give away my lands. I have one word more to say.

My people are far away they do not know your words, this is the reason why I cannot give you an answer now. I show you my heart, that is all I have to say.

Gov. Stevens: Now will Kam-a-ah-kan and Skloom speak.

Kam-a-ah-kan. What have I to be talking about?

Gen. Palmer. We have listened and heard your Cheifs speak. The heart of the Nez perces and ours are one. The Cayuses, the Walla Wallas and these other people say they do not understand us. We were in hopes we would have but one heart. Why should we have more than one heart? [fol. 129] The Young Cheif says he does not see what we propose to give them. Pe-pe-mox-mox says the same. Can we bring these saws mills and these grist mills here on our backs to show these people? Can we bring these blacksmith shops, the wagons & tools on our backs to show them at this time? Can we cause farms of wheat and of corn to spring up in a day that they may see it. Can we build these school houses and these dwellings in a day? Can we bring all the money that these things will cost that you may see it. It would be more than all the horses of any one of these men could carry. It takes time to do these things. We come first to see you and make a bargain. We brought but a few goods with us to give you but whatever we agree to give you you will get.

How long will these people remain blind. We came to try to open their eyes they refuse the light. I have a wife and children, my brother has also a wife and children. I have a good home, fields of wheat, potatoes, oats, peas and beans.

Why should I leave them and come so far to see you? It was to try and do you good but you throw it away. Why is it that you do so? We all sometimes do wrong. Sometimes because our hearts are bad, and sometimes because we have bad council. Your people have sometimes done wrong. Our hearts have cried. Our hearts still cry, but if you will try and do right we will forget it. How long will you listen to this bad council and refuse to receive the light?

I too love the earth where I was born. I left it because it was for my good. I have come a long way. We ask you to go but a very short distance. We don't come to steal your lands, we pay you more than it is worth. Here in this little valley and the Umatilla valley that affords a little good land, between these two streams and all around it is a partched up plain. What is it worth to you or to us? Not one half of what we have offered for it. Why do we offer you so much? It is because our Cheif has told us to take care of his red people. We come to you with his messages to try and do you good. You throw his words behind you. Why do you do it? because you have listened to bad council.

I told you the difficulties that existed between the whites and the Indians beyond the mountains. If the whites and the Indians live together here as they did there, it would be the same. Our Cheif knows this and he sent us here to see you and to talk with you, this we do before there are many whites here.

Pe-pe-mox-mox- says "let us part and appoint another day". Before that day would arrive we might have a great deal of trouble. Gold has been found in the country above yours. Our people are very fond of it. When our people hear this they will come here by hundreds, among these who come there will be some bad people, those bad people will steal your horses and cattle. There are but few of you, you cannot prevent it when you are scattered over a great extent of country, you cannot prevent it: but if you are living in these reservations we can protect you and your property. Then why should you refuse to receive our talk and refuse to allow us to protect you? Your refusal to receive it is not such talk as should come from Chiefs

desirous of promoting the interest of thier people. I want you to think more of this tonight and if you act like wise men I think you will arrive at a different conclusion.

We expect to perfect the arrangements with the Nez Perces perhaps tomorrow. We have but one heart, we expect it will always remain so. We want the Walla Walls, the Cayuses and the Umatillas to unite with us and have but one heart: we want you to stop your ears against bad council and receive that which is good. We do not come among you as traders we come bearing the words of [fol. 130] our Great Chief. If you refuse to receive it our hearts will be sad. Our hearts will be sorry for these chiefs for we like them. Our hearts will be sorry and bleed for all these old men. Our hearts will be sorry and bleed for these young men. Our hearts will be sorry and bleed for these women and children.

We want to help to put food into your lodges and homes. We want to help you to get clothes and blankets to cover you from the strom; we want to help you to get arms and ammunitin to kill game; we want to open your eyes and give you light that you may see. We want to make you a good people.

Will you receive our talk or will you throw it behind you? My heart will be glad tomorrow if you come and say we are all of one heart.

What I have said is for your good: think of it. I have nothing more to say.

Cam-an-ello. It is true you have mercy on us. I think it is true what you have been saying: if you were to send me into a mountainous country still I would say you have mercy on us. What would I be glad for? I was glad to hear the first talk by the Governor, that was the reason I was glad to hear what they said. I would be very glad if hehad said to me stop over on one side, then I would be glad.

What would I be glad about if I were to take a thing and throw it away? That is the reason my heart cries. If you would show me fine lands and I were to see them then I would be glad and go to them. How do you show your pity by sending me and my children to a land where there is nothing to eat but wood? That is the kind of land up there,

that is the reason I cry. Look at my hands! An old man. I have but them by hard work: then I ask myself have I labored in vain? What have I to be glad for?

The white man first showed me and aided me in making my garden and ever mile I have been laboring. Will God think nothing of the labor I have bestowed on my garden? Do you do this to me in pity? I am really pitiable and therefore I pray night and day till I am tired. I have no books. The Missionaries told me if I had no books I had a book in my heart which enabled me to pray to God. They told me in taking water to drink I should think of God, this I have not learned of myself, it is what they have taught me and I keep it. The laws of God are not alone for you, they are for me as well.

Woa-lish-wam-pum. I have got only two things to say. I have listened to your speech without any impression. I did not understand it. I know this. We are the same. You have life and breath you white people; we red people have life and breath. I think the old laws are straight, that they should still exist.

The Nez Perces have already given you their land. You want us to go there. What can we think of that? That is the reason I cannot think of leaving this land to go there. Your words since you came here have been crooked. That is all I have to say.

Gen. Palmer. I desire to say a few words in reply to Cam-an-pello, he says he "is an old man, he has worked hard in his garden." We have said that any man who has a garden or a field and who left it to go to this reservation should have as much improvement made there for him, or be paid for it in money as he chooses. We will go farther and say he shall have a better improvement: it shall have a better fence, be ploughed well. We will not take them there to starve, they shall live better than where they are and if there is not good land enough in the reservation to make them farms we will make it larger.

[fol. 131] Gov. Stevens Said. Although you are all tired, my friends, I must say a few words. My Brother and myself have talked straight. Have all of you talked straight? Lawyer has and his people have. And their business will be done tomorrow.

The Young Cheif says he "is blind and does not understand, What is it that he wants?

Stickuss says his "heart is in one of the three places, the Grand Fonde, the Touchet and the Tu-kan-on."

Where is the heart of the Young Cheif?

Pe-pe-mox-mox "Cannot be wafted off like a feather." Does he prefer the Yakama reservation to that of the Nez Perces? We have asked him before, we ask him now—where is his heart?

And Kam-a-ah-kan the great Cheif of the Yakimas has not spoken at all. His people have had no voice here today. He is not ashamed to speak—he is not afraid to speak—then speak out.

But Owhi is "afraid lest God be angry at his selling his land." Owhi, my brother I do not think God will be angry if you do your best for yourself and your children. Ask yourself this question tonight. Will not God be angry with me if I neglect this opportunity to do them good? Owhi says his people are not here. Why did he promise to come here to hear our talk. I do not want to be ashamed of Owhi. Owhi has the heart of his brother Teayass and his people; we expect him to speak straight out.

We expect to hear from Kam-a-ah-k... from Skloom. The papers we will have drawn up tonight. You can see them tomorrow. The Nez Perces must not be put off any longer, their business must be dispatched.

I hope the hearts of all the others and our hearts will agree. They have asked us to speak straight, we have spoken straight. We have asked you to speak straight; but we have yet to hear from you.

Gen. Palmer: This man (How-lish-wam-pum) says the reason he does not want to go to the Nez Perces' country is that they have given it to us. If he and his people go on that Reservation it will belong to them as much as to the Nez Perces. They will all be served alike, every man will have his farm, it will be his.

Pe-pe-mox-mox says we have met as friends let us say nothing that is bad, let us part friends. We have been friends a long time." I hope we shall always remain friends and as brothers. When we part we will part as friends. Then let us act as friends and as wise men.

Five Crows: Listen to me you Cheifs. We have been as

one people with the Nez Perces heretofore; this day we are divided. We the Cayuses, Walla Wallas, and Kam-a-ah-kans people and others will think over the matter tonight and give you an answer tomorrow.

Owhi: Kam-a-ah-kan is the man who is to speak about these lands. I have nothing to say about them. We will settle the matter among ourselves.

Gen. Palmer: We have heard what Five Crows has said. We want all this people to have one heart, they ought not to have two hearts. Our Great Chief looks upon them all as his children and I hope you will think on what is here said to you.

[fol. 132] Gov. Stevens: My Friends, we will meet in the morning again, we have to get through the business of the Nez Perces so that they may get home, they have a long journey before them. We shall meet as friends I hope. Your hearts and ours will be united I trust. We want every person to come early. If any person wished to speak, speak now or otherwise we shall meet in the morning.

Council met at—

Gov. Stevens Said. My friends, juding from your faces, I think you see your way clear. The paper of the Nez Perces is nearly ready and soon will be read to them. We expect that the Young Cheif, that Pee-pee-mox-mox and Kamiakan will speak now, and we hope that with them the business may be concluded today. Let us know what they want, we are here for that purpose.

The Young Cheif Said, We have been tiring on another for a long time. We did not know our hearts, we did not understand each other on both sides, about this country. We have so many horses and cattle in this country is the reason we were troubled. Your marking out this country is the reason it troubles me so and has made me sit here without saying anything. You Americans, your forefathers are dying in your own country, as many of your people are wealthy in stock it requres a large tract to keep them. Those that have large bands of cattle marks each one a tract for himself. The reason why we could not understand you was that you selected this country for us to live in without having any voice in the matter. We will think slowly over the different streams that run through the country,

we will expose the country and think over it slowly. I cannot take the whole country and throw it to you. If we can agree this country will furnish food for the whites and for us. The whites and ourselves will be compelled to have equal privileges in getting timber from the mountains to build our houses and fences; then we shall love one another. The good of you white people is foremost, the bad is behind, it is the same with us. You embraced all my country, where was I to go, was I to be a wanderer like a wolf. Without a home, without a house I would be compelled to steal, consequently I would die. I will show you lands that I will give you, we will then take good care of each other. The reason for my uneasiness is for my stock which is running all over the country. Perhaps we will be compelled to divide with our stock, one taking one way the other another way, perhaps out there (pointing South) it would be well to draw a line to divide us. This is the reason why I think we should stop a while, that we may come to an agreement. We will see when you make another offer whether we can agree to it. Wait, we may come to an agreement when we see your offer, if any people come send good people; those of the settlers who are here now it is well they should stay. I think the land where my forefathers are buried should be mine; that is the place that I am speaking for. We will talk about it, we shall then know, my brothers, that is what I have to show to you, that is what I love the place we get our roots to live upon (meaning the Grand Ronde). The Salmon comes up the stream—that is all.

Gen. Palmer Said: My brothers, when we quit talking yesterday your minds were very much troubled, you were unwilling to go to the Nez Perces reservation. We have thought of your words. The Nez Perces have a great many horses and cattle, you too have a great many horses and [fol. 133] cattle, perhaps you might not agree together quite so well; your people appear to be much divided where to go. We asked you to give us your hearts and tell where it was, the Young Cheif (We * * *) has given us his heart, the Grand Ronde Valley. We have thought of the Umatillas. Many of your people died there. It is a good country for your horses and cattle. We desired first to have you go all to one place, but to show you that we wish to do you good

I will make you another proposition. I propose to designate for the Cayuses, the Walla Wallas and the Umatillas—To commence on the Columbia river (this is the Columbia river pointing to the may) this is the Umatilla river, this is the Agency, this is McKay's place, this is Wild Horse Creek. Now I propose to select a reservation commencing at the mouth of Wild Horse Creek and running up this creek to the mountains to the head waters of Hou-te-nie Creek, now down that creek till you strike Mr. McKay's claim, now across from his claim to the Umatilla river, then up to the mouth of the Wild Horse Creek, leaving Wm. McKay's claim out of the reservation. This will include all your farms, your houses and gardens within the reservation. You will have sufficient grazing for your stock and land to make farms but your stock will have the privilege of grazing on any lands not claimed by the whites. If the whites should settle near to the reservation their stock might sometimes go onto the reservation while yours might go off it; if they should do so we would not want you to quarrel about it. We would build at suitable points on the reservation a saw-mill and a flouring mill; we would employ millers to attend them for you for twenty years, and by that time you would be able to attend them yourselves. We will have a blacksmith shop and employ a blacksmith for 20 years; we will have a plow and wagon-makers shop and employ mechanics for that for twenty years; we will have a carpenter and cabinet makers shop and employ mechanics for that for 20 years—we will have at least two school houses and employ teachers for at least 20 years; we will build a hospital and furnish a doctor and medicines for twenty years; we will build a good house for Pee-Pee-Mox-Mox, and a good house for the Chief of the Cayuse; we will build a house for Pee-Pee-Mox-Mox's son, we will plow and fence ten acres of land for Pee-Pee-Mox-Mox; we will plow and fence the same for the chief of the Cayuses; we will plow and fence five acres for Pee-Pee-Mox-Mox's son; we propose to do more for him and his son because he leaves his country and goes to another place. We will give him as soon as he goes down to the Dalles for it $500, in money —we will give him 3 yoke of oxen, wagon and two plows— we also give him some other things which it is not necessary to mention. We give him a salary and also the chief of the

Cayuses of $500 a year, in money, this to continue for twenty years—the same as is to be given to the Lawyer, the head chief of the Nez Perces. We give these salaries because they are the head chiefs, and are expected to labor for the good of their people, and in the event of the death of the head chief their successors get the salaries. Now in addition to these things we will expend fifty thousand dollars in the first and second years after the treaty is ratified. This money is to be expended in building houses, opening farms, buying teams and wagons and paying persons working for them, and in any way that the President may deem best calculated to promote their interests. In addition to this there will be expended for you eight thousand dollars every year for five years, for the next five years six thousand dollars a year, the next five years four thousand dollars a year, for the next five years two thousand dollars a year—this makes twenty years, and the amount to be expended one hundred thousand dollars ($100,000). This amount will be expended as the President may direct; we should consult you every year as to how you wanted it paid—part in money —part in goods. You will not be required to go onto this reservation till our cheif the President and his council sees this paper and says it is good; and we build the houses, the mills, and the blacksmith shop. But we want you to allow the white people to come and settle in the country anywhere outside of the reservation.

[fol. 134] The President will have this reservation surveyed and marked off, so that every man that has a piece of land will know which is his. You will be allowed to go and catch fish and dig roots the same as the whites; and if any of you people do wrong to you you are not to shoot them, but to go to the Agent. We expect the chiefs to restrain their young men from doing wrong. We have a few goods here for you, those that we give you will be in addition to these payments, we charge you nothing for them. I have given you now my heart; I have offered you more than your country is worth—more than you know how to count. How long will it take you to decide? If you say it is good the papers can be arranged tonight, tomorrow they can be signed; we would then give you these goods and you could go home with a good heart. We have been here a good many days talking—we are all tired: We commenced far

apart, it is for you to say now whether we shall come together. This I say to the Cayuses, the Walla Wallas and Umatillas—those people are all interested; Pee-Pee Mox-Mox being the first chief I want to hear from him. I have nothing more to say.

Pee-Pee-Mox-Mox said—The young chief has nothing more to say; he has said all he had to say, as if it was I that put obstacles in the way. Our hearts should not be otherwise than one. I have already spoken all that I have to say—I and Gen. Palmer this morning. They have already written all that we have said. I spoke this morning about having a little house, a place to sell my cattle on the other side of the Columbia where my cattle range for a trading post when the Americans pass. I have nothing to talk about; I have only a few words more. I said to Gen. Palmer that I desired permission to get fish there while I lived; when I learn that the house is made, (meaning the reservation) then I shall go there: when we have settled all things then you have your presents for these Indians. Now that we have made up our minds if you think proper you may give us some provisions; sometime tomorrow in the afternoon we will go home; you are now tried—that is all I have to say.

Gen. Palmer Said:—That we have agreed that Pee-Pee-Mox Mox shall have the privilege of building a house at the mouths of the Yakima and catching fish for five years. I should like to have all the chiefs and head men of the Umatillas, Cayuses and Walla Wallas and also the name of every man on this paper that the President may see every man's name and know that they have given their consent.

Gov. Stevens Said:—My friends. I am glad Looking Glass one of your cheifs is coming, he is a friend of Kamiakun; we have now got nearly round the circle; our hearts are almost together; I call upon Kamiakun to say whether we shall get entirely around. My friends, Looking Glass is close by:—he has come way from the Blackfeet—the buffalo country across the mountains; there is war; here is peace and friendship let his first glance by upon you sitting here; when he is close by two or three of us will go and take him by the hand and set him down by his chief in

the presence of his friends Kamiakun. Let us now have Kamiakun's heart.

Kam-i-ah-kan Said: The place that I am from there are but few Indians—all have gone to the Calapooya country. Some are at Nisqually and some at Taih—that is the reason I have deferred speaking till I see my Indians. I wish the Americans to settle on the wagon route; we do not confine them to the road; they may settle about the road so that the Indians may go and see them. I do not speak this of myself it is my people's wish. Owhi and Teias and the chiefs. I, Kamiakan do not wish for goods myself. The forest knows me, he knows my heart he knows I do not desire a great many goods. All that I wish is for an Agent, a good Agent who will pity the good and bad of us and take care of us. I have nothing to talk about. I am tired, I am anxious to get back to my garden. That is all I have to say.

[fol. 135] Joespeh, Nez Perce: These are my children (looking around). I see them all sitting there: talking slowly is good. It is good for old men to talk straight; talk straight on both sides and take care of one another. It is not us, it is those of our children who come after us. It is good for the old poeple to talk together good and straight on account of our children on both sides to take care of each other till the last day, without speaking I am going. It is not anything bad that I am thinking that I am going without speaking, no, it is not anything bad, it is a place to live, a place for our good to live there. Think for year after year for a far way ahead. I wonder what you think if I could see your thoughts. It is not that there is anything bad that I speak. I hear you speaking to my children, and they have many hearts. I am going without talking and you don't know my talk. At the Grand Ronde I say my children on both sides; we have been talking and finished your talk; this is all I have to say.

Gov. Stevens Said. If anybody else wishes to speak we shall be glad to hear them .

Red Wolf Said: I have only one or two things to speak; —I want Mr. Craig to stay there in the Nez Perce country, and not go away. The reason why I wish Mr. Craig to stay there is because he understands us—he speaks our language

well; when there is any news that comes into the country we can go to him and hear it straight; the same for us when anybody comes to speak to us he will sit down with us and we understand them. It is good for him to stay there to interpret on both sides so that each can understand the other.

Gov. Stevens Said: We wish to hear from Skloom, one of the Chiefs of the Yakimas.

Skloom said: What I have to say is about this the earth; It is long since the earth was made and the trees were made to grow out, and there was one there, a very small boy, I do not know what he knew but he took an axe and cut a tree, and marked it as if he has made a watch, he went to the tree and looked up and saw a star, he took a line and measured the land from that tree; all the land he had measured he plowed; about half way on the line he threw the tree across. For this country that he had plowed up he got $800 for each mile: That is the reason the Indians like the place where they have their garden; for the reason there was such a price paid for them; the land uncultivated where there are no gardens is not worth so much, it might be sold for forty dollars a mile. Why should I speak a great deal? We are not bargaining for lots; you know your own country above, you select your piece of land and pay a price for it. There it is the same and have choice. My friends, I have understood what you have said; when you give me what is just for my land you shall have it. This is all I have to say.

Gov. Stevens Said: I have a word to say in answer to the remarks of Skloom Proposals have been made for the lands of the Yakimas and their neighbors; a place has been pointed out for the Indians to live in; outside of this place the gardens and farms are to be paid for in money at a fair value. The price paid will probably be a good deal more than the price he has mentioned for those gardens. I say to Skloom, we do sell good lands for eight hundred dollars a mile, but not in this country. We do not expect to sell any of this land. Skloom probably knows that. I ask Kamiahkin and I ask Skloom, make your own propositions. I also say to Owhi, let us know what you think your lands are worth and where you want your home. We shall meet again in the

morning, I want Kamiakun and his chiefs to make their own proposition. Looking Glass is coming. We shall meet tomorrow morning.

[fol. 136] Saturday, June 9th

The Council opened at 2 o'clock P.M. when Gov. Stevens Said:

My Friends, Today we are all I trust on one mind. Today we shall finish the business which brought us together. Yesterday the Yakamas had not made up their minds fully. Today they and ourselves agree; the papers have been drawn up. A paper for the Nez Perces: they live on one Reservation. A paper for the Walla Wallas, Cayuses and Umatillas, they have their Reservation on the Umatilla. And a paper for the Yakamas, they have their Reservation. These papers engage us to do exactly what we have promised to do.

My brother expalined yesterday to the Walla Wallas, Cayuses and Umatillas what would be given in their paper. It has been given to them in the paper.

In the paper for the Yakamas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Pisconse, the Swan-wap-um and Palouse, the Yakamas, and all the band on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations which they well know and which I understand is satisfactory.

The Nez Perces have their reservation as was shown them in Council and in the paper everything was set down which was promised them. They all know what was said.

The money, the payment intended for the Nez Perces, the Walla Wallas, the Cayuses and Umatillas has been divided. We have given two parts of a $150,000 to the Walla Walla, Cayuses and Umatillas. We have given the Nez Perces three parts or $200,000.

In the Yakama reservation we have not placed as many tribes as we expected. We have thrown out the Okan-ah-gaus and Colvilles and the Tribes below the White Salmon. Their numbers are about the same as the Nez Perces. We have given them the same amount. There is the paper for the Nez Perces (holding up), here is the paper for the

My brother will show the paper for the Walla Wallas, the Cayuses, the Umatillas.

It is stated first in all the papers the Indians who signed the paper then your lands are described. We have got the descriptions from yourselfs. Then your reservations are pointed out, those you all know.

You will not be called according to the paper to move on the Reservation for two or three years : then is secured to you your right to fish, to get roots and berries, and to kill game: then your payments are secured to you as agreed: then your schools, your shops, and physician and the other things we have promised you are secured: then the salaries, the houses and the ten acre farms of your chiefs are secured to him.

Then there is another article if any of you get into debt then payments cannot be taken for your debts, every Indian must pay his own debts.

Then you promise next to be friendly with other tribes and the whites.

Last you are to drink no whiskey and do all you can to prevent others doing it: and also those who drink whiskey will not be paid their annuities.

I have thus given the substance of the different Treaties. Shall it be read over in detail? You have already heard it not once but two or three times. It can be read over Article [fol. 137] by Article and the Interpreters can state to you whether it is what you are promised. If there is anyone present who wishes to speak let him do so before we go on with this business. Let Looking Glass speak.

Looking Glass said. I am now going to speak. From those who have been speaking, they have been listening to us from above and from the ground. A long time ago the Great Spirit spoke to my children. I am from the body of my parents and I set on a good place. The Great Spirit spoke to his children the Laws, will track on the ground strait and after that there have been tracks on my ground and after that the big Chief, the President, his ground was stept on in the same way and for that reason I am not going there to trouble on his grounds and I do not expect anyone to tramp on mine.

I have great respect for my friends, he sees your eyes and

your hearts, and that is the reason all this people are his children. Why do you want to separate my children and scatter them all over the country? I do not go into your country and scatter your children in every direction.

It is for me to speak for these people my children, that is what I say. The Big Chief speaks to his children and I also speak to my children and tell them what to do: and that is what we are talking about: you see where the Sun is. I never go where the white are and mix with them and talk with them.

I am already named from above, by the Supreme Being, my heart is with the country. I live upon and head, that is the reason my heart tells me to say where my children shall go. I want you to look well to what I have shown you.

I want to know if an Agent will stay up in my country?

Gov. Stevens. As long as there are people.

Looking Glass. Will the Agent be there that long to keep the whites from pushing into our country?

Gen Palmer said. Certainly.

Looking Glass. Will you mark the piece of country that I have marked and say the Agent shall keep the whites out?

Gen. Palmer. None will be permitted to go there but the agent and the persons employed, without your consent.

Looking Glass. It is not for nothing I am speaking to my chiefs, it is to talk straight, it is just as if I were to see the President and talk to him it would be straight, that is just what I want, that you talk straight from the President. Look at my talk. I am going to talk straight. When I hear your talk it goes to my heart. I am not like those people (pointing about) who hang their heads and say nothing. We will have a short talk, not a long one. (after a silence of a few mintues the)

Young Chief Said. That is the reason I told the Governor to let it be till another time, till we know what the Looking Glass would say. I heard that Looking Glass was coming.

Governor Stevens. I will say to the Young Chief, let Looking Glass have time to think, he is thinking now in order that he may speak, he will speak striaght and from his heart. We will wait now till we have heard LookingGlass speak.

[fol. 138] Looking Glass. The line of the Cayuse Reser-

vation will be where the trail crosses the Walla Walla, thence in a straight line to the Umatilla below William McKay's house, from thence north of the butte, straight to John Day's River. The reason why that shall be the line is that they want more room for their horses and cattle. (After a pause of a few moments he continued). By what time will you build the mill?

Gov. Stevens. They year they move on, when the President approved the Treaty.

Looking Glass. Yes! Now we will talk. We have talked before. You said you would sent this talk to the President and if he says yes, then it is right. Yes. And I will listen to what the President says and if he says yes, then we will talk.

Billy. This is just putting it off further and making us more tired. You have no pity on us.

Three Feathers. We cannot understand back here. Why don't he speak louder. Looking Glass is speaking, we look upon him as a Chief.

Billy. I thought we had appointed Lawyer our head Chief and he was to do our talking, that is the reason why I have spoken.

Gov. Stevens. I will say to my brother the Looking Glass that everything we say and do is sent to the President. What Looking Glass has said and what I say now goes to the President, but can I send anything to the President unless you agree to it? Can the President act? We have met that we may agree upon something then it goes to the President. The President has sent me and my brother to make this very agreement. We must agree upon something then it goes to the President and if he thinks it is good then he approves of it. I ask Looking Glass to look upon it and see that it cannot be done any other way.

Gen. Palmer. Our great Chief, the President, directed me and my brother to come here. We have been here nineteen days, we have been talking a great deal. That talk has been for your good. We came here to talk straight, we have shown you our hearts, we will not lie to you. Yesterday we made a bargain with the Cayuse, the Walla Wallas and the Umatillas and the day before with the Nez Perces. The Looking Glass was not here but we did not forget him.

We know that when he understands it all he will say yes. This morning we made a bargain with the Yakamas, they with these others all say yes. We expect the Looking Glass and his people will all say yes. We have told these people and it is so said in the paper that their horses and cattle would be allowed to graze outside of the reservation the same as our people when it was not occupied by whites. If we change the line to where he says we would have to stay here two or three days more to arrange the paper. We are all tired. You are tired. Shall we say one thing today and another thing tomorrow?

They have said yes! My heart says yes to the line that was shown yesterday and today. All things will be done as we told you. Shall we do so. My heart says yes. I have nothing more to say.

Looking Glass. Yes! Let it be so.

Eagle from the Light. When I spoke to you before I said that I should speak slowly and I have been thinking about what to say, but I don't know yet what to say. These people have been talking among themselves as though there was two and when I heard what they had to say I said very well: let us go as two.

[fol. 139] Looking Glass. What I showed these people when I came here. I spoke beyond it (referring to the map) and you have said that this talk you would send to the President and he will see it.

You see my body it is not divided, it is one body as these are all my children (pointing about). They have all got horses and cattle that is the reason I made it larger.

I want you to talk plain just like the light and then I will say yes. That is all I have to say now.

Gov. Stevens. I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and can go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. He knows what the Reservation is: that we promise him two mills, a saw and a grist

mills, two schools and a blacksmith; that we give him a physician, and all the other things that have been spoken of; the people all know it, it has been read over two or three times.

This reservation is in his own country. I ask Looking Glass is not this talking straight? We send all this to the President and besides this we pay a certain sum of which you all know: we have been looking for him ever since we have been here: Lawyer will recollect that I have been enquiring when will Looking Glass come? We wanted him to come.

Those who go to the Buffalo are all my children. I am going to see the Blackfeet next moon. The Blackfeet had stolen some of his horses, but he got them back again. I heard the story last night. He killed some of their men. I know that Looking Glass wants me to go and make peace in that country. Let us first agree here.

Gen. Palmer. We buy your country and pay you for it and give the most of it back to you again.

Looking Glass. You have said to me that the whites shall not go over that line, none shall go into that country and this you said and it is said: And you will show to the President what we have said.

Gov. Stevens. I understand Looking Glass has consented with the other Chiefs. The papers are now ready to sign: here I will particularly speak to Kamahkan or the head Chief of the Yakamas. Are you ready?

Young Chief. What the Looking Glass says, I say.

Gov. Stevens. I ask you whether you are ready to sign?

I stated that whatever the Looking Glass said and we said would go to the President. We agreed upon a line yesterday and the day before. The papers are drawn: we ask are you now ready to sign those papers and let them go to the President.

Looking Glass. That he said yes to his line.

Gov. Stevens. Looking Glass is satisfied with the Nez Perce line, the young Chief and Pe-pe-mox-mox yesterday agreed to the Umatilla reserve.

Lookings Glass. I said yes to the line I marked myself, not to your line.

[fol. 140] Gov. Stevens. I will say to the Looking Glass, we cannot agree.

Gen. Palmer. I would say to the Looking Glass, what use is it to purchase his country and give it all back again. We did not come here to talk like boys. We don't wish to part with a misunderstanding.

The Nez Perces, the Walla Wallas, the Cayuses and the Umatillas agree to the boundaries as we have marked. Do you wish to throw all we have said to you behind you. Shall we like boys say yes today and no tomorrow? Pe-Pe-mox-mox, Young Chief and the Nez Perces say yes! None of their people say no! Why do we talk so much about it? I have done.

Young Chief. The President is your Chief and you do what he tell you. That is the reason the Looking Glass marked out the line he wanted: he is the head Chief.

Looking Glass. It was my children that spoke yesterday and now I come and hear them speak. I asked my children what was their hurry? They knew that I was coming. Why did they run and speak till I came: that is the reason I—marked it bigger. I wanted to talk with you and have you talk with me. And after that. Your talk and my talk will go to the President.

Gen. Palmer. I will say to my brother that I did not know that he was absent when we made our minds to come here and set the time. My brother and myself come here and we come a long way. We have been here a long time. We were not in a hurry, these people wanted to go home, they had fields of wheat, and of potatoes, the weeds were growing up, they wanted to go home, there was no one at home to take care of the fields. We have other persons to see besides these.

My Brother has to go to the Blackfoot country and make peace. He wanted to say to them. You shall not steal these peoples horses: you shall not make war upon them: these are the reasons we talk. We talk because our Great Chief told us.

These papers have not been signed, they had not forgotten him nor had we. Shall all our efforts to protect them be destroyed? Shall our talk be thrown away? If the Looking

Glass is a Chief I hope he will act as a Chief acts for the good of his people.

If we were to say yes to his line our Chief would say no! but if we shall say the line we have marked we believe our Chief will say Yes. Which will you do, take that line or have it all thrown away? Let us act like wise men and not part without doing good for each other.

Looking Glass. I am not going to say any more today.

Gen. Palmer. If the Nez Perces are not ready they can talk among them selves and come tomorrow.

If the Cayuses, the Walla Wallas and Umatillas are ready to do what yesterday they said they would, then the paper is ready for them to sign, and tonight they can get their goods and go home when they please.

The paper is also ready for the Yakamas if they choose to sign it they can do so.

Gov. Stevens. The Council will now adjourn till Monday morning and I trust by that time Looking Glass will have thought the matter over and we will be able to agree.

[fol. 141] Monday, June 11th

Council opened at 11 o'clock.

Gov. Stevens said: My children, we have met today for the last time. Every man here present has agreed to a treaty in council. The Nez Perc'es agreed to a treaty. Not one man spoke against it. All agreed that the head Chief would speak for you. You were all called upon to speak. I called upon Joseph to speak and he spoke: "I have a good heart," says Joseph, "what the Lawyer says let it be."

The Eagle-from-the-light said, "the head chief Lawyer had spoken so be it."

The Red Wolf said, "what the Lawyer has said be it so, he is our head Chief."

Said U-ute-sin-ma-le-kin "my Chief has spoken for me." Every man said, I say again, "Lawyer is our Chief." "I agree to the treaty." So said the Cayuses, the Walla Wallas, the Umatillas and the Yakamas. The Young Chief and Stick-uss said, "we pledged our words, we agree."

We all expect that you all will do what you promised to do. We don't believe you will break your word and make us ashamed o you. I don't believe we shall have to say

to the President, "you have promised, and then broke your promise."

No! We know what you will keep your word. First the Nez Perces, –I shall call upon Lawyer the head Chief, and then I shall call on the other chiefs to sign.

Will Lawyer now come forward. (he then came forward and signed the Treaty) Now I call upon Looking Glass and Joseph to sign the Treaty. (After they affixed their names James and the other chiefs and head men put their names to it.)

Gov. Stevens: My Brothers, the Treaties have now all been signed. They will be sent to the President. All the speeches on both sides will be sent to the President. The President will see that everything has been fairly explained and agreed upon between us. He will see that you have all acted like men here. He won't find any fault even with Looking Glass.

Looking Glass came back after a long absents and asked time to look at the treaty. Time was given him to think it over. He was satisfied and we find his name next to his head Chief's.

I think the President will approve what we have done. We will let you know when we hear from him, which will be sometime next year.

We have some few presents to give you which will be distributed upon your leaving the ground. They are designed for those who need them most. You will dispose of them in that way.

Thenceforth you will have me for your Great Chief, Mr. Tappan for your Agent, and Mr. Craig for your interpreter.

The Yakamas will have Mr. Bolon for their Agent. The Walla Wallas, Cayuses and Umatillas will look to Gen'l Palmer hereafter.

There is another point which I wish to speak about from my heart. It is the Balckfoot Council. My Brother, the Looking Glass, knows that we want peace on those Buffalo plains. You all know it. I think I can make peace there. [fol. 142] Nez Perces: Nearly one fourth of your people live there. I want some chiefs of courage and character, and one hundred of your braves to go to that council. I say to Lawyer, the head chief, of the Nez Perce's, I would

be glad to have him go, I would be glad to have Looking Glass go. Arrange this among yourselves. I hope and trust that Mr. Craig will go with you.

The Cayuses, Walla Wallas, Umatillas, and Yakamas, I would like to have some of them also.

We shall have chiefs and braves from the Flatheads, the Cour de lains, Coo-too-mey's and I hope from the Spokanes. The Blackfeet have promised to meet you there in Council and when we meet there will be peace among you. Think this matter over and decide for yourselves.

Gen'l Palmer: My brothers, I wish to say a few words before we part. When we came here we didn't know the hearts of your people. We have been together a long time and have talked a great deal. We have listened to what you have said, and you have listened to what we have said–you have sometimes been afraid that we were not working for your good. Your willingness to come forward and sign the Treaty is evidence that you have decided that we intended to do you good. We have shown you our hearts and you have shown us yours. We commenced a long way apart but now we are together. We are one. I hope we shall always remain as one and have but one heart.

From this time we expect that we and you will always be at peace. We not only want you to be at peace with all whites but we want you to be at peace with yourself. We didn't come here to divide you or to induce one to be against another. Why should you be at war with each other? You may live at separate places, but your hearts would be as one and help each other. The chiefs and old men should give good council to their young people. The young men should listen to the old men and be advised by them. The young people should strive to assist the old people. Take care of them. It is the duty of the old people when they see these boys act foolish to council them. It is the duty of all to take care of your women and children, furnish them with food and with clothing.

I say again! Take care of your old people, supply their lodges with provisions, for you will soon be old yourself and will need help.

We expect you will all leave this ground with good hearts and if there are any among you that have bad hearts, advise

them to throw them away. If your people are foolish and the wrong it is your duty as chiefs to punish them for it. We shall try and prevent the whites from doing wrong to the Indians. And you must prevent your people from doing wrong to the whites.

The Treaty provides that if an Indian steals the property of the whites it may be paid for from the annuities. It also provides that if your people steal other tribes it will be paid for in the same way. We also provide that if the whites take the property of an Indian it must be paid for. The Agent who is the proper person to apply to in case an injury is done you and when any of your people do wrong to the whites, then it is the duty of the chiefs to punish the offender. If one does wrong to an individual he is not to redress his own wrong but he is to submit it to the chiefs or his council, or to the Agent and abide by their decision. It is to be hoped that your people will do no wrong. Let us try and prevent it if we can. We expect the chiefs to look to this and if there is any of their people who have stolen property and have it on hand it is my heart they should give it up to the Agent, and the Agent will do all he can to return your property.

We have, my brother, told you that we had a few goods to give you. Your people are not all here to receive them. We have been here a long time and can't remain to see you all. We shall therefore give these goods into the hands of the [fol. 143] chiefs and we expect the Head Chiefs to call his chiefs and see them distributed justly.

My Brother, Gov. Stevens, will furnish the Nez Perce's with goods. Mr. Thompson and myself will furnish the Cayuses, Walla Wallas and Umatillas with goods. And when we get through talking the head chiefs of the Cayuses, Walla Wallas, Umatillas will go receive the goods and take care of them.

We have not got a great many goods but when this paper goes to the President and he says it is good then we will supply you with other goods, and we shall do all things that we have agreed upon. Mr. Thompson will be the Agent for the Cayuses, Walla Wallas, and the Umatillas.

When we part we will all go to our homes with good hearts towards each other. When we have built the blacksmith shops, saw mills, and chiefs home and other things we have

agreed to. Then we expect you will go upon the reservation, and when you go and if you leave your little farms and improvements they will be valued and you will be paid for them.

I shall go home with a good heart towards all your people, and I shall be very sorry if I hear your people have done wrong. I have nothing more to say at present.

If any of you have anything to say we are ready to listen to you.

Gov. Stevens: I will say to the Nez Perce's, I hope to visit them in their own country when I come back from the Blackfoot Council. I hope also to visit the Yakamas on my return.

The Cayuses, Walla Wallas and Umatillas will look to Gen. Palmer hereafter. They will also look upon me as their friend.

Tin-tin-meet-see: I understand you well. We are never the beginners in doing wrong to the whites. All Indians here understood well what has been said. When your white children come into this country they do things at random. (to the Indians) You have heard all that has been said and now let us go home and do right.

Eagle of the Light: My forefathers are dead, I only am left, there is but the encampement remaining, it is good to hear and think of each other. We have heard good words spoken from the Presdient to take care of us poor people well. His children's way you have come here to see. For days our bodies have been together, also the night and also for years, also for winters. You have shown that he likes his red chldren. I do not want our hearts to come together wrong, but right, and remain so as long as we are a people, and we will stop the bad people on both sides. The Lord will reward us both when our hearts are good that we will look and care for each other,—The old and the young will go right and then all will be right—from little could come great difficulties—that is the reason we speak from small things to big ones—that is all at present.

James Said: It is not from anything bad that I have not spoken. Is is as though the man I speak of is not of the party. When the white people came to my country Mr. See told me when he came there he was coming for good and not

for bad. When the white people come and they would come in great numbers do not do anything bad to them. I have never done bad to them. I wish Mr. Craig to stay with us and hear the Indians speak for he could speak to our people and they could understand him—therefore I wish him to stay.

REd Grizzly Said: I like your talk—you talk well. When you have finsihed I like it still, this you have brought us [fol. 144] from the President. I like that talk my friends. From the time I spoke here I have been sick at heart. This man who has just now spoken, he spoke a little longer because he knows how to speak and there is also another who has just come, the Looking Glass, they speak straight and friendly. You have also spoken friendly, and shown them your heart plainly—not that I am a good man that I like it. My heart is glad as though I see your heart when I hear your words. What I have good to speak I have not spoke yet. (here he was interupted by the Indians when the Red Owl said the young chief wished to say that he wanted you to stop the whites from taking their horses or cattle and if my horses go across the line of the reservation which is a small one I do not want these horses and cattle to be taken off because they are over the line.)

Gen. Palmer said: My brethren. This man has said from little things grown great ones. It is true, it is so—a single word spoken unkindly leads to a difficulty. It would be better if we always would not do or say bad things, but if little things are done wrong we should try and forget them. I have been told that here are sometimes difficulties among the Indians in reference to their mode of worship. That is a thing that we do not interfere with. We are willing to let the people worship God as they please. We do not say do this or do that. If their heart is to sing or pray and preach it is good, if others say it it not our heart to pray and to preach it is good, but we want all people to be good people. If those who sing and pray think it is good, let them to try to convince others. Talk kindly, treat them kindly and convince them they will do right. Some will worship one way and some will worship another—do not quarrel about it but worship or not worship, we want you to have good hearts I have done.—

Looking Glass Says:

As so many are now working, some other time you and I will have a heart. I have a good head and a good heart, by and by we will have a talk.

Council Adjourned sine die at three o'clock.

We hereby certify the above to be a true record of the proceedings.

SS James Doty, Secty. to Treaties in W. Terry. SS
Wm. McKay, Secty. to Treaties in O.T., Office of Indian Affairs, District Office III, Portland 18, Oregon.

Approved, Isaac Stevens, Gov. & Supt. W.T.; Joel Palmer, Supt. Ind. Affairs for O.T.

A true copy from transcript in national archives. Reproduced previously for this court and contained herein for the court's convenience.

APPENDIX C

TREATY WITH THE WALL WALLA, CAYUSE, ETC., 1855

ARTICLE 8. The confederated bands acknowledge their dependence on the Government of the United States and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredation on the property of such citizens, and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians except in self-defense, but submit all matter of difference between them and other Indians, to the Government of the United States or its agents for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the article in case of depredations against citizens. Said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.

APPENDIX D

ENABLING ACT

AN ACT TO PROVIDE FOR THE DIVISON OF DAKOTA INTO TWO STATES AND TO ENABLE THE PEOPLE OF NORTH DAKOTA, SOUTH DAKOTA, MONTANA, AND WASHINGTON TO FORM CONSTITUTIONS AND STATE GOVERNMENTS AND TO BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND TO MAKE DONATIONS OF PUBLIC LANDS TO SUCH STATES.

(Approved February 22, 1889.)
(25 U.S. Statues at large, c 180, p 676.)

* * * *

Sec. 4. That the delegates to the conventions elected in provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and after organization, shall declare, on behalf of the people of said proposed states, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence . And said conventions shall provide, by ordinances irrevocable without the consent of the United States, and the people of said states: –

First. That the perfect toleration of religious sentiment shall be secured and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes: and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the abosolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant. save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of congress may prescribe.

Third. That the debts and liabilties of said Territories shall be assumed and paid by said states respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said states, and free from sectarian control.

APPENDIX E

WASHINGTON STATE CONSTITUTION

ARTICLE XXVI

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:--

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use. Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by an Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provison exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are herby assumed by this state.

Fourth. Provison shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

APPENDIX F

WASHINGTON STATE CONSTITUTION

ARTICLE XXIII

AMENDMENTS

1. HOW MADE. Any amendment or amendments to this Constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such ment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution, and proclamation thereof shall be made by the governor: Provided, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such amendments separately. The legislature shall also cause notice of the amendments that are to be submitted to the people to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state: Provided, That failure of any newspaper to publish this notice shall not be ed as affecting the outcome of the election.

[AMENDMENT 37]

Approved Nov. 6, 1962

APPENDIX G

WASHINGTON STATE CONSTITUTION
ARTICLE I

S 29 Constitution Mandatory. The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

APPENDIX H

UNITED STATES CODE
TITLE 18
CHAPTER 53

S 1151. Indian country defined

Except as other wise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX-I

HEARING ON H.R. 1063

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

EIGHTY-THIRD CONGRESS

FIRST SESSION

June 29, 1953

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Chief Counsel, Bureau of Indian Affairs;	12
Accompanied by WILLIAM R. BENGE, Chief, Branch of Law and Order.	

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H. R. 1063

Monday, June 29, 1953.

House of Representatives,
Subcommittee on Indian Affairs,
Committee on Interior and
Insular Affairs,
Washington, D. C.

The subcommittee thereupon proceeded to the consideration of H. R. 1063, Honorable E. Y. Berry (chairman) presiding.

Mr. Berry. We will next take up H. R. 1063.

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STATEMENT OF HARRY A. SELLERY, JR., CHIEF COUNSEL, BUREAU OF INDIAN AFFAIRS

Mr. Sellery. Mr. Chairman and members of the committee, H. R. 1063 is a bill to amend Title 18 of the United States Code entitled "Crimes and Criminal Procedure" with respect to State jurisdiction over offenses committed by or against Indians in the Indian country and to confer on the State of California civil jurisdiction over Indians in that state.

The State now lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in Title 18, section 1151 of the United States Code, except in the case of the Agua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was previously conferred.

The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of Title 18, United States Code. As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to

the Indian groups themselves, and in California they are not adequately organized to perform that function. Consequently, the Department believes there is a serious hiatus in law enforcement authority

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that can best be remedied by conferring criminal jurisdiction on the State, and the Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H.R. 1063, and none of them have indicated any opposition to the enactment of a bill such as this. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State. Representatives of other groups have done likewise. The California Legislature has memorialized Congress in favor of this legislation and certain other legislation not before us this morning.

The Department recommends that the bill be recast in a form which is attached as a substitute bill which would, we believe, assist in the codification in this bill of the existing sections of the civil and criminal codes of Title 18 for the criminal aspects and Title 28 of the judicial code for the civil aspects. If this type of bill is adopted, we hope it may be a prototype and it will be possible to add Indians in other States in the code so that, from the point of view of an attorney looking into this matter, he will be able to

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determine more readily, we believe, than otherwise would be the case what the State civil and criminal jurisdiction may be with respect to Indians of a particular State.

You will observe, for example, on page 2 of the draft substitute bill that in the case of California, the Indian country affected is that within the Federal-State civil and criminal jurisdiction, which will no longer obtain, as the

State is given jurisdiction over all of the Indian country within the State.

It appears in the case of some of the other criminal and civil jurisdiction bills that the Department will recommend to the Congress that certain reservations be excepted where law and order are regarded as adequate and where the tribe affirmatively indicated its preference for confirmation under its law and order code. But this prototype form we believe will assist in cases of civil and criminal jurisdiction as showing quickly at places in the code where we believe it will be most helpful to attorneys and others what Indian country, if any, may be excepted from State civil and criminal jurisdiction.

It may also be observed that there are provisions in the bill which will, we believe, protect the rights of Indian groups without special recognition from the Congress in the form of a treaty, agreement, or statute with respect to hunting, trapping, or fishing or control of licensing and the regulation thereof, and with those protections both on the

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criminal side and the civil side in the bill it would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, so that they will be subject to the same laws and the same rules as the other citizens.

The Department has recommended that the bill be adopted, but the suggestions of the substitute bill are intended to be of assistance in the uniform treatment of this and other bills.

In order to have it absolutely uniform with respect to California, it is recommended that section 1 of the Act of October 5, 1949, which conferred on the State of California civil and criminal jurisdiction over the land and residents of the Agua Caliente Indian Reservation, be repealed so that there will be the same rule applicable to all Indians in the State.

I would direct your attention to the fact that the Department has submitted this report because of the express

desire of the committee to have it without having first received prior clearance from the Bureau of the Budget. Hence the Department cannot make any commitment at this time concerning the relationship of the views of the Department to the program of the President. However, copies of this report have been submitted to the Bureau of the Budget, and it is hoped we will know within a few days whether or not they believe it is in accord with the program of the President.

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Mr. Berry. Are there any questions?

Mr. Saylor. You have listed in the substitute bill a method to have this as a prototype which will be used for other Indian tribes. You have started here with the State of California, and I would like to have submitted by the Department a recommendation not only with respect to the State of California but in regard to every other one of the western States that have Indians or every State that has Indians, including South Carolina, North Carolina, and Florida. This committee should know what the views of the Department are at the present time not only with regard to the Indians of California but in regard to all of the Indians in all of the States.

Mr. Sellery. I will see that that is done.

Mr. Saylor. Also what Indian country you would recommend, whether all Indian country within the State or whether certain parts of the Indian country can be excepted.

Mr. D'Ewart. The phrase "Indian country" is already defined by law and has a very distinct meaning. It is defined in the recodification statutes adopted a very few years ago, and it is very clear.

Mr. Saylor. I think also the committee should have the benefit of the Department's views. You state there are certain sections of the Code which would not be applicable in the State of California, and I think we should be advised of any

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sections which would not be applicable not only to this law but any other law which might be affected if a similar Act were adopted for all of the Indians.

Mr. Sellery. I wonder if you may have misunderstood me. We are recommending that the State have civil and criminal jurisdiction over all Indians in the State of California and the concurrent jurisdiction of the United States in connection with the ten major crimes and similar criminal acts be ceded to the State so that there will be nothing except State jurisdiction in the State of California. There will be no exception.

Mr. Saylor. Then, I understood, as a second amendment you said you had here in this supplemental bill—was it not the purpose of making sure there would not be concurrent jurisdiction in the State and Federal Government?

Mr. Sellery. That is true.

Mr. Shuford. I think we in North Carolina have only one tribe of Indians—the Cherokees—although we have Indians in the eastern part of North Carolina. Are those under the supervision of the Bureau of Indian Affairs?

Mr. Sellery. Yes, sir; they are. The eastern band of Cherokees is separated from the balance of the North Carolina Indians.

Mr. Shuford. We also have Indians in the eastern part of North Carolina.

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Mr. Sellery. I am advised they are not.

Mr. Shuford. I do not think that tribe has definitely been established by the courts.

Mr. Sellery. In any event, they are not under the jurisdiction of the Bureau of Indian Affairs.

Mr. Rhodes. I would like to request the Department to consider whether or not the State feels that the Indians within the State are ready for this type of jurisdiction and also whether the State itself is ready.

Mr. Sellery. In the case of California—I skipped over that point—the State has indicated its willingness.

Mr. Rhodes. I am thinking of Arizona as to what effect it might have on the law enforcement agencies of the State

of Arizona and also whether the Indians of Arizona have expressed any views.

Mr. Sellery. I think such inquiries are in process with respect to other bills.

Mr. Young. Does your bill limit the provisions for Federal assistance to States in defraying the increased expenses of the courts in connection with the widening of the jurisdiction that the bill encompasses?

Mr. Sellery. No; it does not.

Mr. Young. Do you think it would be necessary to provide for some payment, inasmuch as the great portion of Indian lands are not subject to taxation?

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Mr. Sellery. The Department's report on the Nevada bill has some comments on that. If it is appropriate, I would like to read this in that connection. Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and it is a problem which the States should deal with and accept with Federal financial assistance; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

Mr. Young. That would not quite be true, though; would it? Because for the most part he does not pay any taxes.

Mr. Sellery. No. There is that difference.

Mr. Young. A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

Mr. Sellery. The Indians, of course, do pay other forms of taxes. I do not know how the courts of Nevada are supported

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financially, but the Indians do pay the sales tax and other taxes.

Mr. Young. But no income tax or corporation tax or profits tax. You understand a large portion of the land is held in trust and therefore is not subject to tax.

Mr. Sellery. That is correct.

Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.

Mr. Berry. Is there no authority now for the Department to assist counties in this work?

Mr. Sellery. I am advised there is none.

Mr. D'Ewart. That is only partly true. The Tribal Council sometimes appropriates some funds to help pay the peace officer, and the counties sometimes appoint an Indian as deputy sheriff to cooperate with the towns.

Mr. Sellery. I think Congressman Berry was addressing himself to funds advanced by the Federal Government.

Mr. D'Ewart. Have not you ever paid part of the salary

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of a sheriff?

Mr. Sellery. Mr. Benge, who is chief of our Law and Order Branch, advises me we have not.

Mr. D'Ewart. I was thinking of the Reindeer Reservation where part of that salary was paid. Maybe I am wrong. Maybe they were only using tribal funds.

Mr. Sellery. I think so. That is done in many cases, as you correctly observe.

(The subcommittee thereupon went into executive session.)

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AFTERNOON SESSION

(The Subcommittee reconvened at 3:00 p.m.)

Mr. Berry. Mr. Sellery, is there anything further you have to add to the testimony of this morning?

STATEMENT OF HARRY SELLERY, CHIEF COUNSEL, BUREAU OF INDIAN AFFAIRS; ACCOMPANIED BY WILLIAM R. BENGE, CHIEF, BRANCH OF LAW AND ORDER.

Mr. Sellery. I think there is nothing further. I went rather rapidly this morning because I understood the Committee had to be over in the House. If there are any questions I would be glad to answer them. I think, although I went rather rapidly, I hit the high spots as to what the bill would do.

Mr. D'Ewart. What objection do you see to the Saylor Bill, H. R. 5565, which would be applicable to all the states? The general provisions are the same, except that it is applicable to all the states instead of just those you want to name. I think I am stating it correctly in that the only difference between the bill you discussed, H. R. 1063, and the other bill is that the reference to a particular state is stricken and it becomes a bill to confer civil and criminal jurisdiction over Indians in all states. It makes it applicable to all states. Otherwise I believe that bill is very much similar.

Mr. Sellery. I think that is essentially in accordance with my understanding, Congressman. I can see just super-

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ficially that there might be a problem in terms of the exceptions from cession of jurisdiction to the state which are provided for in certain of the state bills. There might be a problem in terms of the proposal which one of the Con-

gressman advanced this morning for evidence of consent on the part of the state, if this thing were attacked on a general bill principle.

You will recall that I said in the case of certain of the states we had had indications from the Indians on certain reservations where it was thought by the Department that their law and order operations were adequate and where the Indians themselves had affirmatively indicated an unwillingness to be subjected to state civil or criminal jurisdiction, so that if you went into a general bill it might be that there would be some difficulty in dealing with those exceptions if the Congress accepted any departmental recommendations which might provide for the continuance of a separate jurisdiction on the part of the Indians of a particular reservation or reservations in a state.

Whether you would be able to report the bill out on a general bill if we were unable to obtain a commitment on the part of the state as to whether or not they were willing to have this cession of jurisdiction to them I do not know. I do not wish to be misunderstood as preferring special legislation to general legislation, because I do not, and I do

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not believe that the Department does. Just thinking out loud, those are the thoughts which occur to me, Congressman.

Mr. D'Ewart. I said that the two bills are similar. They are not exactly the same, although the intent is the same.

Mr. Sellery. Yes.

Mr. D'Ewart. I note that the Saylor Bill has a Section 5, which would make possible compensation of the Federal Government for the expense of enforcement.

Mr. Sellery. Yes, sir.

Mr. D'Ewart. I think that is in the Poulson Bill.

Mr. Sellery. Yes, sir. That is also in Congressman Young's Bill for Nevada.

Mr. D'Ewart. Yes.

Mr. Sellery. With respect to a comment I had from

Congressman Berry after the hearings adjourned regarding the problem of whether or not the state or local units would be willing to assume the entire cost of administration of civil and criminal jurisdiction if the bills were passed, without derogation to the Department's position—which, as I indicated in the Nevada Bill, is adverse to the proposal—I did discuss at luncheon with the Acting Commissioner the problem which Congressman Berry had posed, and he suggested that if that proposal were to be accepted by the Committee he believed it would be more appropriate to have the administra-

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tion of any Federal financial assistance in the hands of the Attorney General of the Department of Justice rather than the Department of Interior. That is not to be understood as a recommendation, Congressman; but if the Congress in its wisdom sees fit to provide for such assistance, the Acting Commissioner recommends that it be not to amend the Johnson-O'Malley Act, as someone suggested, but to provide a special authorization in whatever form is required if any such authorization is required to the Attorney General to administer any program of Federal financial assistance to states or political subdivisions.

Mr. Berry. Why could it not be handled under the Johnson-O'Malley Act?

Mr. Sellery. The Johnson-O'Malley Act confers the power on the Secretary of Interior. Mr. Greenwood's belief is that the general administration of law and order being under the Attorney General in the Department of Justice, with the use of the much more extended facilities which the Department has through the FBI, makes that desirable. The Acting Commissioner thought you might get a more reasoned judgment on the amount of financial assistance which the state needed. He was just suggesting this as an alternative. No one would deny, I think, that the Johnson-O'Malley Act could be so amended. He believed that rather than continuing this power in the Secretary in connection with the law and order it would

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be preferable if the Congress wishes to do that to give that

responsibility to the Department of Justice. There is no doubt that the Department could do it. He just thought it would be more efficient if done by the Department of Justice.

Mr. D'Ewart. Which one of these many bills does your agency lean towards?

Mr. Sellery. Well, in terms of the mechanical form of the bill, Congressman, we believe that the draft bill which is attached to H.R. 1063 and the draft bill which is attached to H. R. 4367, the California and Nevada bills respectively, represent a desirable form, particularly with respect to the codification into Titles 18 and 28 of the United States Code. It would be agreed, I think, by all, that the same thing could be done by a bill which was not susceptible to codification in Title 18 and Title 28. We thought that type of approach was preferable to the straight approach which does not indicate what the codification will be of Congressman Young's bill for example, H.R. 4367.

I did not bring the others with me, Congressman, but I think essentially most of them were in accord with the reports which the Department made in the previous Congress. It may be observed that we have gone, shall I say, a step further this time, in that we have provided with respect to civil jurisdiction that that shall be codified under Title 28. That was left hanging in the air in the reports which were sent down

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the last time on the comparable bills in the previous Congress.

I would say that the Department supports this prototype bill which was attached to both the reports on Nevada and California. I have not considered what adjustments would have to be made in the event a general bill to which you referred were to be reported out. I do not think it would require any, except in the short title of the bill, provided the Congress were agreeable to keeping in the provisions for those exceptions which this bill reflects for those states where certain Indian tribes wish not to have a cession of civil and criminal jurisdiction to the state but to maintain their own law and order system.

Mr. D'Ewart. Have you brought up with you a list of

states to which you recommend that the law be made applicable?

Mr. Sellery. I have a list of the states as to which bills have been introduced, Congresman. Mr. Benge of our Law and Order Division says that we are recommending tentatively to the Department in the case of California no exceptions from cession of state jurisdiction. The same is true for Nevada. In the case of Washington the tentative recommendation is an exception for the Colville Reservation and the Fort Yakima Reservation. In Oregon there is a recommendation for Warm Springs; in Minnesota for Red Lake; in Wisconsin for Menominee; and in Nebraska, as in the case of California and Nevada, there would be no reservation which the

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Department would recommend be held out as one permitted to administer its own law and order system.

Mr. D'Ewart. Why did you leave out Florida and North Carolina?

Mr. Sellery. I think because no bill was introduced on that, Congressman, as yet.

Mr. D'Ewart. Iowa?

Mr. Sellery. I think we merely took those which were introduced to the Congress, Congressman.

Mr. D'Ewart. I understand the Legislature of Iowa adopted a resolution in the last session asking for it.

Mr. Sellery. We have certain jurisdictional bills already on the books, Congressman.

Mr. D'Ewart. New York State?

Mr. Sellery. New York State, all reservations are under the State jurisdiction. In the case of Iowa the Sac and Fox Reservation is under the criminal jurisdiction, Mr. Benge advises me, but not under the civil jurisdiction.

In the case of Kansas, all reservations are now under state civil and criminal jurisdiction.

As you know, in the case of California under that special

bill the Agua Caliente are covered. State, civil and criminal jurisdiction has already been extended to the state, but only with respect to that one reservation.

In the case of North Dakota Devils Lake Reservation has

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criminal jurisdiction which has been ceded to the state.

We have no bills which have been introduced, I think, with respect to the state of Florida.

I am frank to say I do not know what the Department's point of view would be. I just do not know what its point of view would be on that, Congressman.

Mr. D'Ewart. There is nothing in this proposal which would in any way interfere with the ending of wardship in any of those cases?

Mr. Sellery. In the civil and criminal jurisdiction bills?

Mr. D'Ewart. Yes.

Mr. Sellery. No, sir. There is the protection for those Indian treaty rights both on the civil and criminal side.

Mr. D'Ewart. Does this bill protect the tribal estates, too?

Mr. Sellery. We believe it does. In the case of the criminal, for example, on page 2 of the draft bill subsection 2 states:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a

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> restriction again alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right,

> privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

On the civil side, on page 4 of the draft bill the first two subsections of subsection (b), which are marked off by the semicolons, are the same. The third clause varies slightly to take up, for example, the question of excluding from state jurisdiction the adjudication of Indian trust estates. It says, for example:

> "Nothing in this section * * * shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; —"

and this is the part I want to speak about,

> "— or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

Mr. D'Ewart. Of course that defeats the effort to clean

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up the inheritance muddle under the Indian law.

Mr. Sellery. That would only be true, Congressman, as long as the property were in trust or restricted status. If the Congress chose to lift the trust or restrictions then it would be subjected to state probate just as the unrestricted estates of Indians now are.

Mr. D'Ewart. That is probably as far as we could go.

Mr. Sellery. We thought this reflected what the Congress' thinking was with that limit, as far as we understand the Congress wished to go at this time, with respect to trust or restricted property.

Mr. D'Ewart. Mr. Chairman, I think this is very important legislation. As the Chairman will remember, I appeared before this Committee with a plea for somewhat similar legislation last session. At that time I recited the terrible

situations found on some of the reservations with respect to law and order, which was practically non-existent. In my particular state the Supreme Court has ruled that state law is not applicable in Indian country. When an Indian is committed to the state penitentiary for a felony the court could not bring him out, because there is no jurisdiction. We have to do something like this in order to have some measure of responsibility and so forth on the Indian reservations.

The school truancy laws do not apply on Indian reservations. We appropriate huge sums of money to send Indian

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children to school, and lo and behold the truancy laws do not apply at all.

At least in my state the state health laws are not applicable inside of Indian country. That is not altogether true in other areas because other states have not ruled. Probably they have not ruled because they have not gotten to it. That is what is involved in the definition of "Indian Country".

I therefore think we should report out this bill.

Mr. Aspinall. The draft?

Mr. D'Ewart. The final draft.

Mr. Aspinall. Making it general?

Mr. D'Ewart. Yes.

Mr. Aspinall. The only question I have is whether or not the legislation should be general or whether there are sufficient differences within certain jurisdictions to call for the treatment of each state by a different bill.

Mr. Sellery. May I comment, sir?

Mr. Aspinall. Yes.

Mr. Sellery. We would recommend that this same type of a bill—we think of this one as a prototype—be adopted. Then at any time if at a later date the Indians in a particular state who want to be "hold outs" as I nickname them

from the cession of jurisdiction, can indicate their desire to be no longer "hold outs" it would be merely a question of

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amending the references to them in the sections of the bill which show where the exceptions will be. You delete that exception and then in subsequent issues of the Code it will appear they are now under the state civil and criminal jurisdiction.

Mr. D'Ewart. What I would like to do is to amend your draft to make it general.

Mr. Abbott (Counsel to Committee). Mr. Benge informs me there are 26 states shown there as having Indian populations. You can correct it for the record, Mr. Benge, but I believe several of those states have constitutional prohibitions against jurisdiction.

Mr. Benge. Yes, sir; that is right.

Mr. Abbott. Which would mean that there would be apparently no jurisdiction.

Mr. Benge. It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. The Organic Act which admitted the state to the union and the state constitution would have to be amended. The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. To meet that the State Legislature would have to amend the constitution.

I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitu-

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tions. It would be regarded as an amendment to the Organic Act.

Mr. Aspinall. The State Legislature would not do it. The people of the state themselves would have to do it.

Mr. Benge. Yes, sir.

Mr. Shuford. What is the situation with regard to North Carolina?

Mr. Benge. I believe that the situation in North Carolina is that there is a federal court decision holding that the Indian reservation there, the Eastern Cherokee Reservation, is under the state law and order jurisdiction.

Mr. Shuford. I was under the impression they did have such an arrangement.

Mr. Benge. I think in 1933 there was a decision by the Circuit Court of Appeals for that circuit which held the reservation to be under the state jurisdiction. I know at the present time the sheriff does some work on the reservation. The tribe hires some officers, and they take all their cases into the JP Court in Bryson City.

Mr. Shuford. They also have a federal court where they try Indian cases.

Mr. Benge. Yes, sir; they have some Indian cases in the federal courts there.

Mr. Shuford. Could you give me the citation on that?

Mr. Benge. I do not have it with me, Congressman, but I

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can get it for you.

Mr. Shuford. Will you get it for me.

Mr. Benge. Yes, I will.

Mr. D'Ewart. Mr. Chairman, I move that H. R. 1063 be amended by striking out all after the enacting clause and inserting in lieu thereof the provisions of the Department draft; and that the staff work out with the Indian Bureau the names of the states and Indian countries affected, that shall be included in each section of the bill; and that they make that ready for a report to the full Committee.

Mr. Aspinall. I wonder if they have the idea.

Mr. Sellery. A general bill, Congressman; is that correct?

Mr. D'Ewart. What is that?

Mr. Sellery. You are proposing a general bill?

Mr. D'Ewart. No, I am proposing that all after the enacting clause in the Poulson Bill be stricken and that your

Department bill be inserted in lieu thereof; and that on page 2 and again on page 4 you advise the Committee staff as to the states and the Indian country that should be inserted.

Mr. Aspinall. That is a general bill.

Mr. D'Ewart. Yes.

Mr. Berry. No, it is not; because some states will not be included.

Mr. Aspinall. I understand it is not universally general, but it covers a number of states.

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Mr. D'Ewart. You understand?

Mr. Sellery. Yes, sir.

Mr. Shuford. Mr. Chairman, I would like to be sure about North Carolina, because I think North Carolina might be brought in on that.

Mr. Benge. There does seem to be some question, Congressman, as to whether or not the codification of Title 18 in 1948 reconstituted the reservation as "Indian country" so as to deny state jurisdiction.

Mr. Shuford. I know they do maintain a deputy sheriff on the reservation.

Mr. Benge. Yes, sir.

Mr. Shuford. Whether that is by comity I do not know.

Mr. Benge. It is not clear legally whether the court decision to which I referred is now the law, or whether it is now "Indian country" under Title 18.

Mr. Shuford. Will you advise me about that?

Mr. Benge. Yes, I will.

Mr. D'Ewart. I move the adoption of the motion.

Mr. Berry. Is there a second?

Mr. Aspinall. I second the motion.

Mr. Berry. All in favor of the motion say "Aye".

(Thereupon, the motion was agreed to.)

Mr. D'Ewart. Now, Mr. Chairman, I move that the title of the bill be amended to conform with the remarks.

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Mr. Berry. Was your previous motion to report the bill to the full Committee?

Mr. D'Ewart. No, I had not moved that. I move that the title be amended.

Mr. Aspinall. I second the motion.

Mr. Berry. All in favor of the motion say "Aye".

(Thereupon, the motion was agreed to.)

Mr. D'Ewart. Now, Mr. Chairman, I move that H.R. 1063 as amended be reported favorably to the full Committee.

Mr. Aspinall. May I ask a question? Do you intend to have a committee print made?

Mr. D'Ewart. I believe we should.

Mr. Aspinall. I second the motion.

Mr. Berry. All in favor of the motion say "Aye".

(Thereupon, the motion was agreed to.)

(Thereupon, the Subcommittee proceeded to other business.)

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NOTE: Mr. Berry designated two days as the time for filing of any statements by interested persons.

HEARING ON H.R. 1063

BEFORE THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

FIRST SESSION

July 15, 1953

[Pagination of the typed transcript is shown in the text at the right margin.]

1

H. R. 1063

TO AMEND TITLE 18,
UNITED STATES CODE, ENTITLED
"CRIMES AND CRIMINAL PROCEDURE"

WEDNESDAY, JULY 15, 1953

House of Representatives

Committee on Interior and
Insular Affairs

Washington, D. C.

The Committee met, at 10:00 a.m., in the Committee Room of the House Committee on Interior and Insular Affaris, the Honorable Wesley A. D'Ewart (acting chairman) presiding.

Mr. D'Ewart. We now have before us House Resolution 1063, a bill introduced by our former colleague, Mr. Poulson, to amend title 18, United States Code, entitled "Crimes and Criminal Procedure", with respect to State jurisdiction over offenses committed by or against Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State.

(The Bill is as follows:)

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Mr. Abbott. (Counsel) I believe the committee members have before them a memorandum on House Resolutions 1063 dated June 26, 1953 addressed to Chairman Berry of the subcommittee on Indian Affairs. The last five pages of the allied papers you have, the bill that the committee presumed they were acting on at the last full committee session on July 7. However, it was apparent in reading the transcript that amendments were made to the presented bill previously before the committee and it is suggested, if that is proper procedure, that unanimous consent of the other committee members be obtained to correct the amendments made to indicate clearly the committee intent.

As amended by the committee and as indicated by the amendments proposed, House Resolution 1063 would confer exclusive civil and criminal jurisdiction over Indians in the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, and within those states.

In the state of Minnesota the Redleg Band of Chippewa Indians would be excluded and remain under Federal jurisdiction. In Oregon, the Warm Springs Tribe would remain under Federal Jurisdiction and in Wisconsin the Menominee Tribe would remain under Federal jurisdiction. The bill does not as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling acts for

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Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and Washington provided that exclusive Federal jurisdiction would be retained.

The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction. The five states which were recommended to have exclusive jurisdiction conferred on them in each instance were consulted with regard to their desires in accepting or not having state jurisdiction. One other state, the state of Nevada, has no such legal impediment, but they were not able to agree. The Indian Bureau was not able to agree with state and local authorities as to whether or not Nevada was in a position to accept responsibility for exclusive jurisdiction.

I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments by the people in the state, they could then take over the exclusive civil and criminal jurisdiction over Indians and Indian matters.

In addition, Mr. Westland's state, which is one state which has a constitutional impediment, the one section provides for removal by the state of constitutional impedi-

ments. The other section would apply to any other of the 15 Indian

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states, so that they by affirmative legislative action could assume either criminal or civil jurisdiction, or btoh, at such time as the matter were laid before the legislative bodies.

In short the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply first to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.

The other amendment would apply to any other Indian states, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

Mr. Engle, as you will recall, added an amendment having to do with the application of Indian liquor laws and that presumably would be operative only in the five named states, California, Minnesota, Nebraska, Oregon, and Wisconsin. The proposed substitute you have before you now carries the United States Code No. 1161. The committee will recall that we reported H.R. 1055 to the House, which is a general liquor repealer bill, and in it we added a new section to the United States Code, 1161, so that the proposed substitute you have before you in addition to the amendments mentioned would require that that U. S. Code

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number for the new section be changed from 1161 in each instance to 1162.

(Discussion off the record.)

Mr. D'Ewart. It is regularly moved and seconded that we consider our action on July 7 with respect to House Resolution 1063. All those in favor say aye.

Opposed, no.

You now have before you for further consideration House Resolution 1063 and the substitute offered by the department.

(The substitute bill referred to is as follows:)

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Mr. Westland. Mr. Chairman, is the bill ready for amendment?

Mr. D'Ewart. The bill will be considered read and open for amendment.

Mr. Westland. With respect to the amendment that Mr. Abbott handed to me, with particular reference to the states, I presume, Mr. Abbott, you intend to strike the present section 6 of the bill and renumber it?

Mr. Abbott. (Counsel) As the bill is laid before the committee, the substitute bill, the last section is section 5.

Mr. Westland. I do not have that substitute bill.

Mr. Abbott. (Counsel) You have a memorandum of June 26, 1953 and the last five pages on that collection refer to a bill beginning, "To confer jurisdiction on the State of California;" and so on. That is the substitute before the full committee.

Mr. Westland. This amendment would insert two new sections. First is section 6, which says: "The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act, provided that the provisions of this Act shall not become

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effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their state constitution or statutes, as the case may be."

Mr. D'Ewart. I do not think we have to grant permission to a state to amend its own statutes.

Mr. Abbott. (Counsel) Mr. D'Ewart, I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, but by some state courts it may be interpreted as being necessary.

Mr. Berry. Would you yield to me.

Mr. D'Ewart. Yes.

Mr. Berry. Does not this make this bill applicable to all states who do amend their laws under the constitution, and it greatly increases the authority of the bill.

Mr. Abbott. (Counsel) The intention was to grant it to all states as such time as they were willing to take it. The five states we have named have been consulted with by the Indian Bureau. At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it. The other states not included, such as Mr. Young's state, Nevada, have indicated unwillingness and they have good reasons, I believe. The Indian Bureau agrees, to accept

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such jurisdiction at this time. They by a subsequent amendment will be enabled to affirmatively assume jurisdiction by legislative action.

Mr. Westland. I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment in order that they can get at it.

Mr. Berry. I am for the amendment. I just wanted to understand it.

Mr. Westland. The next section is section 7. It says that "The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to the assumption thereof."

Mr. Berry. Mr. Chairman, I would like to ask a question. Would it not be better to word that to say that this "shall be applicable," instead of saying "consent is hereby granted." Why not say "The provisions of the law shall be applicable" to these states wherein they do these things.

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Mr. Westland. I believe the law would then be applicable to them, once they had taken this affirmative action.

Mr. Rhodes. Will the gentleman yield. You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.

Mr. Dawson. That brings up another question: Whether your wording should refer to the Enabling Act. You say "We hereby give our consent for them to amend their state constitution." Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say "Not withstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution."

Mr. Abbott. (Counsel) I believe that clause "notwithstanding any provisions of the Enabling Act" for such states might well be included. It would make clear that Congress was repealing the Enabling Act.

Mr. Dawson. To give permission to amend their constitution.

Mr. Abbott. (Counsel) I think that would help clarify the intent of the committee at the present time and of Congress if they favorably acted on the legislation.

Mr. Berry. Mr. Chairman, then we get right back to your objection.

Congress does not have to give consent to a state to

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amend its constitution or its laws.

Mr. Dawson. Because when the Enabling Act was passed, they said this state can become a state upon certain

conditions, except for the Enabling Act. In other words, we restrict what they can put in their laws and constitution to begin with. The state cannot go any further than their Government lets them go when they become a state, so now we are lifting one of those restrictions.

With respect to the state of Utah, for instance, the Federal Government said, the state of Utah shall not pass any laws giving them jurisdiction over Indians, or to try Indians for offenses. That was part of the Enabling Act on which our constitution was based. Therefore, we have no right to change our constitution or even our statutes without consent of the Government.

It is in the Enabling Act in all of these five states. That is the reason for my suggestion that you might well refer to the Enabling Act and say, "Notwithstanding any provisions of the Enabling Act consent is hereby given to amend the constitution."

Mr. Abbott. (Counsel) It is in the constitution as a direct result of being in the Enabling Act. In the Government Enabling Act, the Federal Government retained the jurisdiction and the states in their constitutions had a prohibition against any legislation which would assume jurisdiction.

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Mr. Westland. Then that first phrase of section 6 would read "Notwithstanding anything in the Enabling Act, the consent of the United States is hereby given to the People of any states to amend." Is that correct?

Mr. D'Ewart. I think it should be "Notwithstanding the provisions of the Enabling Act."

Mr. Rhodes. I should refer to "Any Enabling Act" under which a state was admitted to the Union instead of "The Enabling Act." I mean there are various enabling acts.

(Discussion off the record.)

Mr. D'Ewart. Would you read the amendment now as you have it.

Mr. Westland. Section 6 then will read "Notwithstanding

the provisions of any Enabling Act for the administration of a state to the Union, the consent of the United States is hereby given to the people of any state to amend where necessary their state constitution or existing statutes as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act, provided that the provisions of the Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their state constitutions or statutes, as the case may be."

Mr. D'Ewart. Is the proviso necessary?

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Mr. Young. I think so.

Mr. Dawson. I move the adoption of the amendment, Mr. Chairman.

Mr. D'Ewart. It has been regularly moved that House Resolution 1063 be amended by adopting a new section, section 6, as read. All those in favor say aye.

Opposed, no. It is so ordered.

Mr. Westland. Then section 7 will read. "The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, is provided for in this Act to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to the assumption thereof."

Mr. Chairman, I move the adoption.

Mr. D'Ewart. Question.

My state's Supreme Court has ruled, because of the definition of "Indian country," which is described as anything within the interior of an Indian Reservation, the state has no jurisdiction within the country and they have therefore been turned loose in the Federal penitentiaries for certain felonies. This does not apply to that kind of circumstance?

Mr. Dawson. It certainly would not unless the state of Montana passed the legislation.

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Mr. D'Ewart. However, the bill without this provision would be applicable to Montana?

Mr. Abbott. (Counsel) No.

Mr. D'Ewart. The state legislature has the right. That was the decision of Supreme Court of our state. We are putting these amendments in to take away the Federal restrictions.

Mr. Hosmer. Will the gentleman yield?

I think in this case Mr. D'Ewart brought up, purely on the face of the decision, you could not tell, without seeing what the provision was, whether it was a rule that was because of inability within the state itself because the lands were actually outside the state, although surrounded by it, or whether it was because of prevailing provisions of Federal, which are being eliminated by this act here.

Mr. Dawson. One thing you can be assured of, the state would not be harmed by this provision, because you are simply giving them the right to pass legislation if they see fit to do so.

Mr. Pillion. It would not increase their jurisdiction automatically.

Mr. Dawson. No, anymore than it will Nevada's. If Nevada does not want to take this on and does not feel they should be obligated to take this expense, they certainly do not need to pass any legislation to take it on.

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Mr. D'Ewart. It has been regularly moved and seconded that there be substituted for House Resolution 1063 by adding section 7 as read. All those in favor say aye. Opposed, no. It is so ordered.

Under the action previously taken, all amendments formerly adopted to this substitute bill were deleted.

Mr. Aspinall. Mr. Chairman, with that understanding, I have been advised that Congressman Engle offered an amendment to the bill relative to the application of Indian

liquor laws and offered it as section eight and it was adopted. I would ask unanimous consent at this time that that amendment which was approved by this committee formerly be inserted as section five and the present section five, which is a repealer, become section eight of the bill.

Mr. Dawson. I second the motion.

Mr. Young. Mr. Chairman, off the record.

(Discussion off the record.)

Mr. Young. I move we defer action on this until Mr. Engle can be consulted and bring it up again at the next meeting on Tuesday.

Mr. Westland. I do not agree with that. It seems to me, first of all, you have done a lot of work on this particular bill and gotten it in pretty good shape with the possible exception of this liquor amendment in there. First of all, as Mr. Abbott said, you have House Resolution

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1055 probably coming up first on the floor and we can tell pretty well by the way that is received as to how this bill might be received. If that bill is accepted then there is no need for the liquor amendment in this. If it is defeated this bill could come as it is and, as somebody mentioned here previously, that particular portion could be stricken on the floor and let the rest of the legislation go through. I think the bill ought to go out as is. It represents quite a bit of work by quite a few people.

Mr. Aspinall. You mean the bill should go out without colleague Engle's endorsement?

Mr. Westland. No; certainly get his agreement to what we have done here this morning.

Mr. Dawson. Off the record.

(Discussion off the record.)

Mr. Young. Mr. Chairman, I withdraw my objection and withdraw my motion to defer consideration on it.

Mr. Aspinall. I ask unanimous consent then that we report it. Will the clerk read my unanimous request?

Mrs. Arnold. (the Clerk) You asked unanimous consent that the Engle Amendment become section five and that section five, which is a repealer clause, become section eight.

Mr. Aspinall. That is right, and that the section be numbered 1163.

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Mr. D'Ewart. Do I hear any objection?

Mr. Dawson. I think I seconded it, and then the objection was raised. Now the objection has been withdrawn.

Mr. D'Ewart. I would like the record to be clear. I am willing to adopt the amendment but I want the record to show I am not for the liquor clause.

Mr. Aspinall. Mr. Chairman, I offer at this time the amendment of Mr. Engle, which was agreed to.

Mr. D'Ewart. Let me get this clear. I am willing to accept your offer of this amendment, but I want the record to show that I opposed it.

Mr. Aspinall. I understand. It was agreed to heretofore to include section eight on this bill and I make that motion.

Mr. Berry. The Engle amendment will be section eight?

Mrs. Arnold. (the Clerk) It will now be section five.

Mr. D'Ewart. Your motion is to make the Engle amendment section five of this bill as adopted in amendment.

All those in favor say aye. Opposed, no. All those in favor hold up their hands. Eight.

Opposed. One.

It is so ordered.

In order to perfect the bill filed we have to perfect it by including in the language California, Minnesota, Nebraska, Nevada, Oregon, Washington, and Wisconsin in the appropriate places.

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Is there any objection?

Mr. Young. Mr. Chairman, did you say Nevada. I object to Nevada, because only 15 percent of our state is owned by the state and 85 percent is owned by the Federal Government.

Mr. D'Ewart. All right, California, Minnesota, Nebraska, Oregon, and Wisconsin. Washington is also excluded.

Is there objection to correction of the bill to read, California, Minnesota, Nebraska, Oregon, and Wisconsin? The Chair hears none and it is so ordered.

Is there objection to amending the title to conform with the contents of the amendment?

The Chair, hearing none, the title is so amended.

I believe there is now need for further amendment by inserting the Minnesota Redleg Band of Chippewa Indians, the Oregon Warm Springs Tribe, and the Wisconsin Menominee Tribe. Is there any objection to the insertion of that?

If not, it is so ordered. Title is amended accordingly.

Mr. Young. Mr. Chairman, I move the bill be approved and the Chairman directed to take such steps as necessary to enact it and that if H.R. 1055 is disapproved, the Chairman be directed to ask unanimous consent to take out section eight which was Congressman Engle's amendment before being considered in the House.

Mr. Dawson. A question there. As I understand it,

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H.R. 1055 is on the consent calendar. That means if anybody over there objects, it goes off or it goes over until the next time. Three objections and it goes off completely. Do you interpret that to mean that it is a defeat for the amendment if it gets one objection over there. Is that what you mean, one objection on the floor means that this automatically goes out of our bill?

Mr. D'Ewart. No; it means that the committee amendment can be offered to be striken from the bill.

Mr. Young. That is what I mean because that is the only reason I withdrew my objection to it originally.

Mr. Dawson. That is to be interpreted then as a defeat.

Mr. D'Ewart. It has been regularly moved and seconded that the substitute bill for H.R. 1063 as amended be reported to the House and that the Chairman take such steps as nessary to insure its enactment, with inclusion of committee amendment in the event there is objection to the consideration of H.R. 1055. All those in favor of the motion say aye. Opposed, no. It is so ordered.

The committee stands adjourned.

(Whereupon, at 12:00 noon, Wednesday, July 15, 1953, the committee recessed subject to call.)

Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977
No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

SLADE GORTON,
Attorney General,
MALACHY R. MURPHY,
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STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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Hearings on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 53, 54
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually.

Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

In its Statement Of The Case, the Tribe is attempting to relitigate here factual contentions on which it was unsuccessful in the court below. The

Tribe cannot, and does not, contend that the trial court's findings of fact are unsupported by any evidence in the record. A wealth of such support for the trial court's findings does exist, and they must be accepted as verities here. *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 339.

For ease of reference, as well as for emphasis, the relevant portions of the trial court's opinion, constituting its findings and conclusions, are here repeated. The court found, for example:

> "It was not proved at trial that the state or county have discriminated against the plaintiff to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens of similar geographic location. Nor was there any evidence of any conspiracy to discriminate. * * *" (Trial court opinion, App. p. 19.)
>
> "The evidence does not support the charge that plaintiff's racial class has suffered from disparity of governmental services offered to other Yakima County and City residents. Nor does the evidence show that other residents of the State of Washington have different treatment than plaintiff's members, or that the system of financing and allocating government services and resources in the State works to the peculiar disadvantage of plaintiff or its members." (Trial court opinion, App. p. 20.)
>
> "There is little evidence that governmental service provided non-Indian residents of the county was not provided Indian residents in like quality and quantity. Plaintiff has failed to make out a case of violation of the right to equal protection by the state or county or their officers. It has not been shown that the state and county

> system of financing and providing general governmental services lacks a rational purpose or that it does not comply with the due process requirements of the Fourteenth Amendment." (Trial court opinion, App. p. 21.)

For purposes of this reply brief a few examples of the Tribe's attempt to relitigate its factual contentions is illuminating. On p. 11 of the Brief of Appellee, the Tribe accurately points out that the trial court, in its findings, noted that adopted Yakima children (that is, presumably, Yakima Indian children adopted by non-tribal parents) suffered "cultural shock," "loss of hunting and fishing rights," "tribal membership," "support while seeking higher education" and "entitlement to share in the annual per capita distribution." No mention, however, is made of the fact that *if* this is the case it is not because of any action whatsoever on the part of the state or county, but *rather* because of the way that the *Tribe* chooses to define its membership requirements.

On the same page of its brief, the Tribe again points out that the trial court noted that the handling of Indian juveniles was "less that perfect." It ignores totally, however, the trial court's notation of one of the reasons for that imperfection. In fn. 5 of its opinion the trial court found that

> "Part of the imperfection may be attributed to a lack of cooperation from the Tribe. The Juvenile Court Services Director testified that he could use more personnel. He has 15 salaried officers and 100 volunteers throughout the county

other than the reservation. So far only one Indian volunteer has responded to his several requests for assistance. There are 15 receiving homes (short term foster homes) in the Lower Valley and one in the Upper Valley. None are operated by the Indians. Since 1971 this department's budget has increased from $286,000 to $424,000 and staff from 5 to 15 probation officers. * * *" (Trial court opinion, fn. 5, App. pp. 23 and 24.)

This brief recital demonstrates that the Tribe's attempt here to retry the facts falls far short of the trial court's findings and the record.

SUMMARY OF ARGUMENT

We do not address, in this reply brief, the equal protection claim of the Tribe, in which the United States, as its amicus, has refused to join. That claim has been amply covered in our opening brief (Wash. Br. 32-41) and our discussion there fully answers the contentions of the Tribe on that issue. (Tr. Br. 68-80) Our primary focus, accordingly, is on the meaning of PL 280, as it relates to both the "disclaimer" issue and the "partial jurisdiction" issue.

(1) We first place the partial jurisdiction problem in proper perspective, by showing the real source of the problem—the tribal option. (Pp. 7-12, infra) In 1963, the Washington legislature decided that it would not unilaterally assume the complete measure of jurisdiction allowed by PL 280. The legislature conditioned the full assumption of state jurisdiction on the consent of the Tribe involved. We then discuss

the possibility of severing that option from the state statute if affording the option to the tribes is held to violate the terms of PL 280.

(2) We show the disastrous impact which total invalidiation of Washington's jurisdictional system would have upon non-Indians, (pp. 13-19, infra) who constitute the large majority of the reservation population both on the Yakima Reservation and statewide.

(3) We answer the contention of the United States that the disclaimer issue has not been settled by this Court. But, recognizing that the Court is free to reopen the issue if it so chooses, we show that the issue has not only been settled, but settled right. (Pp. 19-42, infra)

Our focus, of course,is on § 6 of PL 280, which gives the consent of the United States to the people of any state "to amend, *where necessary*, their state constitution or existing statutes, as the case may be" to remove any legal impediment to the assumption of jurisdiction. Relying upon the legislative history of § 6, and the overall purpose of PL 280, we demonstrate thet § 6 incorporates a *state* standard of necessity, not a federal standard. The purpose of PL 280 was to remove federal barriers to state jurisdiction, not to create or preserve them. Section 6, accordingly, does not require a constitutional amendment if none is required as a matter of state law.

We also show that by reenacting the language

of § 6 in the 1968 Civil Rights Act, the Congress itself adopted our construction of that language.

Under the reading of § 6 urged by the Tribe and the United States, the disclaimer clause, as embodied in both the enabling act and our constitution, would still be in effect. By its terms, however, the disclaimer clause extends only to Indian (*i.e.*) trust lands; thus, if it invalidates anything, the disclaimer clause invalidates Washington's jurisdictional system only as it applies to Indians on Indian lands or trust land. The Washington system remains intact both for non-Indians, no matter where they are found, and for Indians on nontrust lands.

We also discuss the original meaning and purpose of the disclaimer clause, showing that it has nothing to do with jurisdiction of the type contemplated by PL 280.

(4) The partial jurisdiction issue is then taken up. (Pp. 42-54, infra) We demonstrate that meaning of the phrase "in such manner" in § 7 of PL 280 allows Washington to condition total jurisdiction upon tribal consent, as it did in 1963. Not only does Washington's jurisdictional system, incorporating this factor of tribal consent, not offend the overall goal of Congress in enacting PL 280, it enhances it.

We examine § 403 of the 1968 Civil Rights Act, to show (a) that Congress, then fully familiar with Washington's jurisdictional system, clearly considered that system to be valid under § 7 of PL 280 and

(b) that Congress intended that this jurisdictional system was to be preserved.

(5) After disposing of the Tribe's claim that the statute embodying that jurisdictional system is unconstitutionally vague, and that PL 280 itself does not apply to the Yakimas, we set forth the various alternative dispositions which this Court might adopt in this case. (Pp. 54-63, infra) We conclude by refuting the contention of the United States that invalidating this system in toto would have no adverse practical consequences. We show that those consequences would be disastrous not only to non-Indians, but to harmonious relations between Indians and their non-Indian neighbors. (Pp. 64-66)

I. INTRODUCTION

A. The Source of the "Partial" Jurisdiction Problem—the Tribal Option.

In enacting RCW 37.12.010 in 1963, the Washington legislature made a deliberate decision to preserve a measure of tribal self-government, for the Yakima Tribe and for all other Washington tribes as well. It is for this decision to preserve a measure of tribal autonomy that the State is now being challenged.

The court below has held that this decision violates the Equal Protection Clause of the Fourteenth Amendment, but not the terms of Public Law 280. The United States, while doubting that it violates

the former, contends that it most certainly violates the latter. The Tribe, not unexpectedly, contends that the State's decision violates both.

In evaluating these contentions, it is most important to understand precisely what it was that the legislature decided. Perhaps the best starting point is to examine what the legislature could have decided, but didn't, for it had a range of alternatives.

The legislature could have decided to keep the 1957 law intact, without change.[1] Under that law, it will be recalled, tribal consent was necessary for *any* assumption of jurisdiction. Further, in practice and perhaps as a requirement of state law as well, such assumptions of jurisdiction were on an "all or nothing" basis. Once the tribe consented, total jurisdiction was in effect.

Had the legislature decided to continue the 1957 system, obviously no "partial" jurisdiction issue would exist. For state jurisdiction under PL 280 over each reservation would be in effect either totally or not at all.

At the other end of the range, the legislature could have eliminated completely any tribal consent as a condition of total jurisdiction to be effective. In this case, too, no "partial" jurisdiction issue would exist. The only grounds of attack on such a legislative decision would be the "disclaimer" issue, which, at least as framed by the United States and the Tribe,

[1]Chapter 240, Laws of 1957, discussed at Wash. Br. p. 8.

has nothing to do with the "partial" or "total" nature of the jurisdiction being assumed.

In fact, the legislature selected a third alternative. The legislature obligated and bound itself to assume total jurisdiction, viz., the full jurisdiction authorized under PL 280. But the full effectiveness of that jurisdiction was conditioned upon tribal consent as a sensitive recognition of the desire of some tribes for a maximum degree of autonomy.[2]

We do not here wish to imply any criticism of the decision made by the Yakimas or by any other tribe.[3] After all, our legislature gave them the right to make that decision, and deliberately refrained from making it for them. We are certain that the

[2]At Wash. Br. p. 34-37, we show exactly what jurisdiction was conditioned on tribal consent and what jurisdiction was not. We need not repeat this discussion here.

[3]Nor do we here wish to engage in a battle of semantics or labels, on the issue of whether jurisdiction over tribes such as the Yakimas should be called "partial" or "total." In *Quinault v. Gallagher*, 368 F.2d 648, at 657, 658 (9th Cir. 1966) the court characterized the 1963 statute as follows:

> "* * * We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. * * *
> "In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280. * * *"

In our view, the most important sentence here is the last, not the first. As shown by this statement, the critical question is whether the "indicated condition precedent" involves a violation of PL 280 (or of the Equal Protection Clause). We have no quarrel with the use of the term "partial" so long as it does not distract one from focusing on this question. The important point is to understand that the jurisdiction is "partial" solely because of the existence of the "condition precedent" and that it is the Tribe's choice, not the State's which makes that jurisdiction effectively "partial."

legislature gave the tribes that choice in the full expectation that some would make it one way, and some would make it the other. And that is exactly what has happened.

Also we here wish to place into proper focus the principal legal questions involved in the "partial" jurisdiction issue.

First, does PL 280 forbid the legislature from giving the tribes the choice that it did? More precisely, under PL 280, were the only alternatives legally available to the legislature in 1963 the two which we have previously described, each at the opposite end of the range of alternatives? Or was there another alternative available, viz., total jurisdiction, the full effectiveness of which was subject to tribal consent? Deference to tribal choice, we submit, is not forbidden by PL 280.

Secondly, by choosing this third alternative, and thereby, leaving room for tribal choice, did the legislature violate the constitutional rights of the tribal members arising under the Equal Protection Clause, at least in those cases in which the tribe chooses to leave the state jurisdiction partially ineffective, as has the Yakima Tribe? This third alternative, we submit, violated no constitutional rights.

If our submissions on one or the other of these two questions are rejected, then a further question must be answered—though not necessarily by this

court. What should be judicially stricken? RCW 37.12.010 in its entirety? Or just the offending element, *i.e.*, the element of tribal choice? The answer to that question is obviously one of utmost practical importance. And, as even the Ninth Circuit recognized, this severability question is really one of state, not federal, law.[4]

The United States invites the Court, as we do, to consider the "practical consequences" (U.S. Br. p. 87) of whatever its decision might be. (See U.S. Br. pp. 54-59, 87-88.) This severability question raises one of the most important of those practical consequences. This same question also shows the paradoxical nature of the argument of the United States and the Tribe on the partial jurisdiction issue. Their complaint is cast in terms of the State taking *too little* jurisdiction, *i.e.*, taking "partial" instead of "total." But the real position is that the State took *too much*, *i.e.*, that the State took any at all.

The apparent complaint can be easily solved, by severing from RCW 37.12.010 the language which affords the tribal option. That result, we need hardly point out, would not satisfy the Tribe. But it would

[4]We discuss the severability question in more detail at pp. 60-63, infra. The question would be essentially the same if RCW 37.12.010 had been restructured slightly. The legislature could have just switched the effect of tribal inaction. It could have provided that in the absence of a tribal request for partial jurisdiction, the result would be total jurisdiction. The Yakimas undoubtedly would have made such a request, and the situation would be exactly the same as it is now. But the severability question then might have been put in sharper relief.

certainly solve any partial jurisdiction problem—if that be the real problem. One more than suspects that it is not.

Indeed, the United States is perfectly correct in suggesting that from the point of view of a Tribe, such as the Yakimas, which looks upon state jurisdiction, however limited, as a terrible thing, the tribal option constitutes a Hobson's choice. (U.S. Br. p. 66, 67.) If any jurisdiction, however little, is bad, more jurisdiction is certainly worse, not better.

But what counts, we submit, is the point of view of Congress, not the Tribe. And the Congress which passed PL 280 was intent upon accomplishing the transfer of jurisdiction over Indian reservations to the states, not preventing such transfers.

Here the Tribe and the United States take, as they must, a 180 degree turn. They argue that Congress considered total state jurisdiction as good—*i.e.*, as permissible under PL 280—and partial jurisdiction as bad—*i.e.*, as impermissible.

We end with a simple observation: If, as argued by the Tribe and the United States, the existence of the tribal option violates this congressional intent, because it results in partial jurisdiction, the solution is simple. The congressional intent can be fully accomplished by severing the option.

B. The Scope of the Problem—The Impact on Non-Indians.

From a reading of the briefs of the United States and the Tribe, one could easily gain the impression that only the interests of Indians are involved in this case. Such an impression would be completely wrong.

First, some facts. The record shows that there are approximately 3,000 members of the Yakima Tribe resident on the Yakima reservation, and approximately 22,000 non-Indians. (See Wash. Br. p. 23.) The Indians thus constitute about one-eighth of the reservation population.[5]

Such a pattern is far from unusual on Washington reservations. As this court is already aware from *Oliphant v. Suquamish Tribe*, No. 76-5729, decided March 6, 1978, on the Port Madison Reservation there are about 3,000 non-Indians and about 50 Indians.[6]

On the Puyallup reservation—if there still be one[7]—there are less than 1,000 resident tribal members, and approximately 25,000 non-Indian residents.[8] On the Colville reservation, there is a total

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[5] If we are following correctly the arithmetic of the United States (U.S. Br. 3, 57 and 87), the United States asserts that there are approximately 6,000 tribal members resident on the reservation. We do not know where this figure comes from, and the United States does not tell us. In any event, it is contrary to the record, and to the truth. The United States is correct, however, in its figure of 22,000 for the non-Indian population, which it refers to as simply "other [reservation] residents." (U.S. Br. p. 3.) And after this interesting reference, no more is said about these "other residents," save on the charts at App. B.

[6] *Oliphant*, n. 1.

[7] *Cf., Dept. of Game v. Puyallup Tribe*, 433 U.S. 165, 173, n. 11.

[8] See 1970 U.S. Dept. of Commerce Census. According to that census, tracts for this area in Pierce County, Washington, nine census

population of approximately 7,000, of whom approximately 3,200 are tribal members.[9]

On some of the smaller reservations, on the other hand, the Indian population outnumbers the non-Indian.[10]

Taking all Washington reservations as a whole —including the Yakima and Puyallup—we would estimate a total non-Indian population of approximately 58,000, and a total Indian population of approximately 13,500.[11] Statewide, then, Indians constitute less than a fifth of the total reservation population of approximately 71,500.

What are the legal consequences for these reservation non-Indians if Washington's assumption of jurisdiction is struck down? The Tribe touches on them only in passing (Tr. Br. p. 20) and the United States mentions them in Appendix, B, Chart 1 of its

tracts are completely within the boundaries of the claimed Puyallup Reservation. (Nos. 601, 602, 621, 62, 633, 705, 708, 709 and 710. It reflected at that time a total population of 22,848 with an Indian population of 579. When the proportionate part of the three census tracts which lie partially within and partially without the boundaries of the claimed reservation are taken into consideration, the result is a total population of 26,666 (at the time of the 1970 census) with an Indian population of 636.

[9]See Motion to Dismiss or Affirm in *Confederated Tribes of the Colville Indian Reservation, et al. v. State of Washington, et al.*, No. 78-60, p. 5.

[10]This is the case, for example, on the Lummi and Makah Reservations. See reference at n. 9.

[11]In making this estimate, population figures for reservations not specifically mentioned are taken from the Amicus Brief of The National Tribal Charimen's Assn. Appendix A, in Oliphant. We dispute, of course, the statement of the United States that there are 20,000 reservation Indians. U.S. Br. 57. Again, we do not know where that figure comes from, and the United States does not tell us. Nor does the United States even purport to give a figure for the state-wide non-Indian reservation population.

brief, though not in the text. We have attempted to spell them out at Wash. Br. pp. 20-24.

We need not repeat that discussion here, other than to recall the general result: Federal law, and only federal law, would be applicable to all of these non-Indians pursuant to 18 U.S.C. 1152, except to the extent that the offense falls under the *McBratney* exception to § 1152,[12] in which case only state law would be applicable.

Whether the federal government will obtain the resources—the police officers, the prosecutors, and the judges—to shoulder this responsibility under such a result is far from clear. One of the principal reasons for the passage of PL 280 in the first place was the breakdown in law and order on Indian reservations, a breakdown for which the federal government was in great part responsible.[13]

Twelve years after the passage of PL 280, in 1965, the federal government was still having difficulty in fulfilling its law and order responsibilities. In opposing a bill which would have given the federal government concurrent jurisdiction over crimes by non-Indians against other non-Indians, the Acting Secretary of Interior stated in a letter to the Chairman of the Senate Judiciary Committee:

[12]*U.S. v. McBratney*, 104 U.S. 621.

[13]"As one commentator has explained, 'federal law enforcement was typically neither well-financed nor vigorous.' " (U.S. Br. 74) See also, Hearings Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs on H.R. 459, H.R. 3235 and H.R. 3624. 82nd Cong., 2nd Sess (1952) p. 16.

"As a practical matter, the Federal courts are reluctant to add to their crowded dockets offenses of this kind, many of which are in the misdemeanor category. The U.S. attorneys are reluctant to prosecute for the same reason. At the present time, the Department is having difficulty in funding the meager law and order programs carried on jointly by the tribes and the Bureau of Indian Affairs, and it is improbable that additional investigative, detention, trial, and appeal expenses could be justified." (Hearings on Constitutional Rights of the American Indians Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), p. 321.

There is no evidence that the situation is any different in 1978.[14]

[14]Such evidence as we can find suggests that the situation has not changed. As recently as March 9 of this year, in its testimony on S. 2502, the Tribal-State Compact Act of 1978, the Justice Department asked for an amendment to the bill "* * * to assure that S. 2502 cannot be construed to authorize states and tribes to give additional criminal law enforcement responsibilities to the Justice Department." Statement of Sanford Sagalkin, Hearings Before the United States Senate Select Committee on Indian Affairs, 95th Cong. 2d Sess. (1978), p. 115. The reason for this amendment was stated by Mr. Sagalkin:

"The reasons for this are very simple.

"Changes in Federal jurisdiction require knowledge about the particular U.S. attorneys' offices, particular courts, the backlog that may exist in the courts, marshal services, and so forth. It requires a planning and budgeting process that should be fed into any decisions on changing Federal authority." Hearings, at p. 118.

Similar concern was voiced in 1975 by Jerry C. Straus, counsel for various Indian tribes, in his testimony on S. 1, Hearing Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 94th Cong. 1st Sess. 1975 p. 241.

"Moreover, the implementation of the proposed extension of federal criminal jurisdiction would aggravate the present inability of federal prosecutors to enforce effectively the laws regarding offenses by non-Indians on Indian lands. We continue to doubt the adequacy of present federal resources to assume successfully any additional criminal enforcement responsibilities on Indian lands. * * *"

If the status quo is to be changed, by an expansion of federal jurisdiction, the change should be made by the Congress, which can take all of these practical problems into account.

It might be argued that federal jurisdiction over non-Indians is not a serious problem, because of the *McBratney* exception to § 1152.[15] But this argument founders on the fact that the scope of this exception is completely uncharted in a huge area of criminal offenses, *i.e.*, the area of "victimless" crimes.

The problem is best illustrated by the facts in *Oliphant*. Mr. Oliphant allegedly got into a fight, and was supposedly disturbing the peace; we do not know whether any Indians were involved until the tribal police tried to break the fight up. Mr. Belgarde was allegedly engaged in reckless driving, endangering the population at large rather than any specific person.

Under Oliphant, Mr. Oliphant and Mr. Belgarde should have been arrested by someone other than tribal police and tried by some court other than a tribal court. But should it have been state or local police? And a state court? Or should it have been federal officers and a federal court?

[15]While we assume, along with the United States, the continued vitality of the *McBratney* exception, Interior appears to have had its doubts. As stated in this same letter from Interior to the Chairman of the Senate Judiciary Committee:

"Although the language of 18 U.S.C. 1152 and 13 seems to indicate that the Federal courts have jurisdiction over offenses between non-Indians, the judicial decisions leave that conclusion somewhat uncertain. The present Criminal Code was enacted in 1948. The substance of sections 1152 and 13 was contained in earlier law, but it was stated in different language. Under the earlier law, the Supreme Court held that the State has jurisdiction over such offenses (*People ex rel Ray v. Martin*, 326 U.S. 496 (1946), and that the Federal Government does not have jurisdiction (*United States v. McBratney*, 104 U.S. 621 (1881)). Whether the enactment of the 1948 Criminal Code changes the situation is not clear." (1965 Hearings, p. 320)

As we point out in our opening brief (Wash. Br. p. 22, n. 6), we don't know. The United States doesn't know either. See U.S. Br. App. B, Chart 1, discussion of Class 6-10, which covers victimless crimes, and states "But see cases 11-15." Cases 6-10 are, according to the United State's chart, under state law, and Cases 11-15 are under federal law. Where do the cases of Mr. Oliphant and Mr. Belgarde fall? The United States is as uncertain as we, as the "But see * * *" indicates.

Cases such as these are the normal, day-to-day stuff of law enforcement. Yet the United States and the Tribe argue for a result under which no one knows what authority, state or federal, is responsible for handling these cases.

The practical law enforcement problems involved in geographical checkerboarding are, we suggest, miniscule when compared with those involved in determining whether federal or state law applies in a specific case involving a non-Indian offender, such as Mr. Belgarde or Mr. Oliphant.[16]

The *McBratney* exception, we submit, creates more problems than it might solve.

Finally, if RCW 37.12.010 is invalidated *in toto*, federal law enforcement responsibility must be extended not only to a whole new class of offenses by non-Indians, but also to a whole new class of offenses

[16]Any "checkerboarding" problem involves only Indian offenders. Under RCW 37.12.010, non-Indian offenders are subject to state jurisdiction wherever the offense takes place.

by Indians. The federal government would have to protect not only Indians from non-Indians, and Indians from Indians, but non-Indians from Indians as well. And this protection would have to be afforded on every portion of every reservation, be it in the cities of Wapato and Toppenish, located on the Yakima Reservation,[17] or in a portion of the city of Tacoma, located on the Puyallup Reservation, or in the community of Suquamish, located on the Port Madison Reservation.[18]

Perhaps the federal government is up to the task. But history affords little reason for the 58,000 non-Indians on our reservations to be hopeful.

II. THE DISCLAIMER QUESTION HAS BEEN SETTLED BY THIS COURT AND SETTLED CORRECTLY.

A. The Question Has Been Settled by this Court.

First, a comment on the Court's formulation of

[17]In its brief, at p. 14, the Tribe asserts that "there are no non-Indian communities located within the exterior boundaries of the reservation." How it can make such an assertion in light of its own concession in Tr. Br., p. 14, note 20, immediately following the quoted language, of the respective non-Indian and Indian populations of Harrah, Toppenish and Wapato (non-Indian population of each town, 91%, 94%, 91%, respectively), all located entirely within the reservation, is baffling indeed. If the Tribe is relying on the court's discussion of the term "non-Indian community" in *U.S. v. Mazurie*, 419 U.S. 544, such reliance is misplaced.

[18]RCW 37.12.010 does not, of course, completely protect the non-Indian from the Indian offender if the Tribe has not consented to "total" jurisdiction. For the non-Indian victim may be on trust, *i.e.*, Indian land, when the offense takes place, in which case he must look to the federal government for protection in major offenses and to the Tribe for minor offenses. But if he is on nontrust land, *e.g.*, in his own home, he is afforded state protection.

the issue in its Order of February 7, 1978, noting probable jurisdiction. That formulation reads:

> Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

The disclaimer question has nothing to do with the "partial" nature of the State's jurisdiction over the Yakima reservation. If disclaimer is an issue, it is one which arises whether that jurisdiction be partial or total.

Secondly, contrary to the assertions of the United States, the issue has been settled by this Court. (U.S. Brief pp. 16-18). In *Makah Indian Tribe v. Washington*, appeal dismissed 397 U.S. 316, the Motion to Dismiss or Affirm (p. 8) stated:

> "The main issue involved in this appeal is whether the State of Washington has the authority under its constitution to assume jurisdiction over Indian tribes and reservations within this state pursuant to the provisions of Public Law 83-280 by legislative enactment and without amending Article 26 of the State Constitution. * * *"

We do not see how the question could have been presented more clearly.

This Court may have subsequently opened the question again; for the United States is correct in stating:

> "* * * [t]his Court treated the question as still open in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-178, and remanded a subsequent case for the [Washington] State court to consider it. *Tonasket v. Washington*, 411 U.S. 451." (U.S. Br. p. 17)

But in dismissing the second appeal in *Tonasket*, after the State court had considered the question on remand and in dismissing the appeal in the companion case, *Comenout v. Burdman*, 420 U.S. 915, the Court closed the question once again.[19]

We find it difficult to believe that, in dismissing the second appeal in Tonasket, this Court did not consider as being before it for a decision the very question which it had told the State court to decide, and which the State court did in fact decide. The question did not somehow become lost on its return trip to this Court.

The United States also suggests that in *Comenout v. Burdman*, 420 U.S. 915, which was decided in the same Order as *Tonasket*, the question was viewed as insubstantial because it involved an order for the *temporary* custody of an Indian child and might have become moot.[20] (U.S. Br. pp. 17, 18). In fact, the case involved more than temporary custody.

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[19]We again remind the court, as we did in our opening brief, p. 30, that at the time of its dismissal of these appeals the court had been presented with all of the so-called "newly discovered legislative history" relied on so heavily by the Tribe, and by the United States in urging the court to now give this question plenary consideration.

[20]That the government can make such a suggestion we find astonishing. Certainly the appellants in *Comenout* did not think the issue moot, for they were strenuously attempting to have the deprivation order overturned long after the expiration of its *initial* six-month term.

The Department of Social and Health Services had petitioned the trial court for an order of *permanent deprivation*. 84 Wn.2d 192, 193, 525 P.2d 217. And the Indian parents then filed for a writ of prohibition against the Department and the trial court to stop them from proceeding any further in the matter. The case was not moot then, and in fact never became moot.[21]

Though the question is settled, the Court is certainly free to open it up again. But in deciding whether to do so, the distinction made by Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, provides the proper guideline:

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. * * *"
> (285 U.S. at 406-408)

The disclaimer issue is not a constitutional issue; it is purely statutory. Thus, application of *stare decisis* is all the more appropriate here. If there has been error in settling this issue, it has been an error uniformly made by this Court and all other courts

[21]The Department has informed us that now, seven years after commencement of *Comenout*, the Indian children are still under the custody of the Department and have been placed by the Department in state-supported foster care with Quinault relatives on the Quinault Reservation.

that have directly ruled on the issue. It is also an error that has been around for a long period of time, since at least 1959.[22]

Congress has had ample time to correct the error, if it be one. But as we shall show at pp. 46-54, *infra*, Congress not only failed to reject the holdings of *Paul* and its progeny, but in 1968 impliedly adopted them, with full knowledge of exactly what it was doing.

We turn, then, to the merits of the question, to show that the question is not only settled, but "settled right."

B. The Issue Has Been Settled Correctly.

1. *The Meaning of "Where Necessary" as Used in Section 6 of Public Law 280.*

For ease of reference, we quote again the language of § 6.

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, *where necessary*, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." (Emphasis supplied)

[22]*State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) was decided that year, and was the first of the cases ruling on this issue.

What is the meaning of this phrase "where necessary"? More precisely, does it incorporate a federal standard of necessity? Or a state standard?

The United States and the Tribe apparently contend that it incorporates a federal standard,[23] and that under this federal standard a state with a disclaimer clause, such as Washington, must expressly remove the disclaimer language from its constitution before assuming any jurisdiction under PL 280.

We contend that it incorporates a state standard, and that the question of the necessity of a constitutional amendment is one of purely state law.

The Congress, of course, could have incorporated a federal standard. Indeed, it could have said to the so-called disclaimer states—and even to the non-disclaimer states: "We don't care how your constitutions read or how your courts might interpret them. To assume jurisdiction, you must refer the matter to the voters for their approval."

Did the Congress, in § 6, say something like that to Washington? Or did it say, instead: "Do whatever you have to do, in order to assume jurisdiction. If your constitution, as interpreted by your courts, contains an impediment which prevents you from assuming jurisdiction and if it requires our permis-

[23]We say "apparently" because the United States attempts to explain away the insertion of the phrase "where necessary" as a mistake, based upon Congressional ignorance. U.S. Br. p. 36. Since the phrase does not fit the argument, it is to be effectively dropped out of the statute.

sion to remove that impediment, you have our permission."

The language of § 6 does not tell us whether the standard of necessity is to be federal or state. But that fact, in itself, is significant. If a federal standard were intended, one might reasonably expect that the statute would clearly set out what that standard is, instead of just cryptically saying "where necessary" and nothing more.

This consideration, however, is hardly dispositive; and accordingly, we turn to the legislative history for such assistance as it gives in answering the question.

2. *The Meaning of the Phrase "Where Necessary" in Light of the Legislative History: The June 29 and July 15, 1953 Hearings.*[24]

We start with a point of agreement. Assume that a stranger had come into these hearings[25] and asked the question: "Would Washington have to amend its constitution in order to assume jurisdiction?" The answer from those assembled would have been "yes."

But we now reach the critical point of disagreement. For the Tribe and the United States, that is the end of the matter. We, however, believe that our

[24]The transcript of these hearings is printed as Appendix I to the Tribe's Brief; and we shall cite to the pages of that appendix. This same transcript, we again note, was provided to this court in *Tonasket* and *Comenout* when it dismissed those appeals.

[25]The hearings appear to be really "mark-up" sessions of the committee.

stranger must also ask the next question: "Why? Is your answer 'yes' because that's the way you want it to be, as a matter of federal law and as a federal requirement? Or is it 'yes' because that is your understanding of state law?"

The answer, we submit, would be: "Because of our understanding of state law."

The important transcript is that of the July 15 meeting, when the actual text of §§ 6 and 7 were before the subcommittee. Immediately after Mr. Westland, a Congressman from Washington, had read to the members the proposed language of § 6, the chairman, Mr. D'Ewart raised the question:

> "Mr. D'Ewart. I do not think we have to grant permission to a state to amend its own statutes.
>
> "Mr. Abbott. (Counsel) Mr. D'Ewart, I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, *but by some state courts it may be interpreted as being necessary.*" (Emphasis supplied) (Hearings I-25, I-26)

For Mr. Abbott, at least, the term "where necessary" meant "where necessary under state court decision."

For Mr. Westland, as well, the purpose of § 6 was not to impose some federal requirement, but to facilitate removal of any state impediment:

> "Mr. Westland. I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this

> jurisdiction as far as criminal and civil was concerned, *but they do have a constitution there that requires this amendment* [Sec. 6] in *order that they can get at it.*" I-26 (Emphasis supplied)[26]

Mr. Westland's understanding clearly was that the impediment existed as a matter of *state* law.

It was also his understanding that in order to "get at it," permission of the Congress was necessary because of the Enabling Act.

This was also the understanding of the other committee members.

> "Mr. Berry. Mr. Chairman, [D'Ewart] then we get right back to your objection.
> "Congress does not have to give consent to a state to amend its constitution or its laws.
> "Mr. Dawson. Because when the Enabling Act was passed, they said this state can become a state upon certain conditions, except for the Enabling Act. In other words, we restrict what they can put in their laws and constitution to begin with. The state cannot go any further than their Government lets them go when they become a state, so now we are lifting one of those restrictions." Hearings, I-27, I-28.

How the subcommittee viewed the problem is quite clear. In the constitutions or statutes of states such as Washington, there were impediments to these states assuming jurisdiction. This situation existed, not because that was the way the subcommittee

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[26]The United States apparently views the phrase "this amendment" as referring to an amendment of Washington's Constitution, and not to the proposed amendment to the bill. (See U.S. Br., Paragraph beginning on p. 36 and ending on p. 37). This is clearly a misreading of what Mr. Westland said.

wanted it, but rather because that was the situation as a matter of *state law*. Further the subcommittee understood that under the enabling acts, federal permission was necessary in order to change state statutes or constitutions. And in order to accomplish that change, permission was to be given in § 6. The purpose of § 6 was to "lift" restrictions—to use the term of Mr. Dawson—in order that states could "get at" any restrictions under state law—to use the term of Mr. Westland. The purpose was not to create, as a matter of federal law, any restrictions, it was just the opposite—to remove them.

The subcommittee clearly believed that these state law restrictions existed in Washington; and it probably believed that they could be removed only by an express constitutional amendment, approved by the voters. But the subcommittee gave no indication that these restrictions were to be locked in as a matter of *federal* law. Again, the purpose was to remove federal restrictions, not to create them.

3. *The Meaning of the Phrase "Where Necessary" in Light of the Overall Purpose of PL 280.*

The United States and the Tribe view § 6 as constructing an obstacle course. Its purpose is not to facilitate state assumption of jurisdiction, but rather to create a federal requirement, independent of any state requirement, for an express constitutional amendment, approved by the voters.

Again, we must ask "Why?" Why would the

Congress create such an obstacle course? The United States notes that Congress could have unilaterally overridden the Washington disclaimer clause, had it so chosen (U.S. Br. p. 32) The United States then engages in interesting imaginings as to why Congress chose not to. These imaginings are worth quoting:

> "*What considerations led to this decision, it is not easy to say.* It may be that the 83d Congress, despite its "assimilative" viewpoint, thought it important to assure the full-fledged consent of the State's citizenry before this important step was taken, carrying with it substantial new responsibilities, among them a heavy additional financial burden. Popular approval may have been deemed especially appropriate in the "disclaimer" States on the assumption that the disclaimer provisions evidenced an unusual degree of white-Indian hostility. It is not inconceivable that some who voted for Public Law 280 saw in the requirements of Section 6 a measure of protection for the Tribes against over-zealous legislatures. Others no doubt simply deemed it "fitting and proper" that what had been settled by the people of the State as a whole should be undone only by them.
>
> *We cannot know with assurance what informed the legislative mind.* * * *" (U.S. Br. p. 32-33) (Emphasis supplied)

There is not one bit of evidence, in either the text of PL 280 or in any of the legislative history, that these considerations "informed the legislative mind."[27] And the difficulty encountered by the United

[27]In fact, we do know what informed the legislative mind; the July 15 hearing tells us. The subcommittee perceived a problem under state law, a problem which, in their understanding, could only be solved by the states if federal law (the enabling act) were first changed. So the change was made. It is that simple.

States in trying to ascertain "what considerations led to this decision" strongly suggests that this was not the decision at all—as indeed it was not.[28]

The overall purpose of PL 280 was succinctly stated in a 1975 Report of the Senate Interior Committee.[29]

> "It should be noted that the bill as amended accomplished a transfer of jurisdiction only in the five specified states. In all other states the transfer of jurisdiction could only be accomplished upon the initiative of the state involved. However, *no barrier to the assumption of jurisdiction by a state other than its own willingness to do so was erected by the bill:* * * *" (Emphasis suplied)

This statement echoes the words of Mr. Abbott, subcommittee counsel, in the July 15, 1953 hearing:

> "The intention was to grant it [jurisdiction] to all states at such time as they were willing to take it." I-26.

This purpose of removing, rather than creating, barriers to state jurisdiction is strikingly shown by a subsequent comment of Mr. Abbott. The subcommittee is still discussing § 6:

> "Mr. Dawson. That brings up another question: Whether your wording should refer to the

[28]Observe that some of the considerations suggested by the United States would be as applicable to non-disclaimer states, such as Nevada or Idaho (*cf.*, U.S. Br., note 15) as they would to disclaimer states. The problems of "a heavy additional financial burden" and "over zealous legislatures" would be no less great in the non-disclaimer states. Yet, no requirement of voter consent was established for these states. Indeed, these same considerations would be equally applicable to the *mandatory* states.

[29]Background Report on Public Law 280, 94th Cong., 1st Sess., Senate Committee on Interior and Insular Affairs (1975), p. 21.

> Enabling Act. You say "We hereby give our consent for them to amend their state constitution." Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say "Not withstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution."
>
> "Mr. Abbott. (Counsel) I believe that clause notwithstanding any provisions of the Enabling Act" for such states might well be included. *It would make clear that Congress was repealing the Enabling Act.*" I-27 (Emphasis supplied)

Whether the disclaimer portion of enabling act was technically "repealed" or not is debatable; like Article XXVI, Washington's constitutional disclaimer clause, it is still "on the books." What is not debatable is that that clause was to have no more force or effect. Mr. Dawson's amendment, which was adopted, and Mr. Abbott's comment on that amendment, make this clear. The purpose was not to create or even to preserve any federal barriers, even those arising from the enabling act. Rather the purpose was to remove them.

Yet the underpinning of the whole argument of the United States and the Tribe on the disclaimer issue is this: The legal ghost of the enabling acts goes on, turning the question of what the state constitutional disclaimers mean and how they can be nullified into questions of rigid, unbending federal law.

We cannot overlook, in considering the purpose of PL 280, the "termination fever"—to borrow a

phrase from the United States (U.S. Br. p. 73)—of which PL 280 was just a part. Congress was intent upon terminating its special responsibilities to Indians, and assimilating them into society at large. See, generally H.R. Rep. 848, 83rd Cong. 1st Sess. (1953), "Background History of this Legislation". PL 280, while stopping short of termination and clearly preserving treaty rights, was designed to transfer jurisdiction from the federal government to the states as expeditiously as possible.[30]

The drafters of PL 280, however, had one great concern; before any such transfer, the state had to be able and willing to accept jurisdiction, and had to indicate that ability and willingness by affirmative legislative enactment or—if necessary under state law—by actual constitutional amendment. The drafters wanted no void in jurisdiction, either as a legal or as a practical matter.

As stated in S. Rep. No. 699, 83rd Cong. 1st Sess., p. 5 (The Senate report adopts House Report 848 verbatim):

> "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, *there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.*" (Emphasis supplied)

[30]The United States is surely right when it states " * * * the congressional mood was plainly in favor of ending the special status of Indians and to pull down the reservation fences that kept out State law." U.S. Br. p. 73.

In *Kennerly v. District Court of Montana*, 400 U.S. 423, 427, this Court emphasized the same point:

> "* * * Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities. See HR Rep. No. 848, 83d Cong. 1st Sess, 6, 7 (1953)"[31]

Congress did not wish to override any existing state impediments to state assumption of jurisdiction, even though, as observed by the United States, Congress could have done so. U.S. Br. 32. Similarly, Congress did not wish to force jurisdiction upon a state unwilling to take it. For that would have resulted, as a practical matter, in a continuation of the "hiatus in law enforcement authority" (S. Rep. No. 699, p. 5, *supra*) which PL 280 was designed to eliminate. The dangers stemming from legal authority and an unwillingness to exercise that authority had been amply demonstrated to Congress by the

[31]This fact is itself important, for Montana is a "disclaimer" state. Montana and Washington became states under the same enabling act. Enabling Act of 1889, 25 Stat. 676. Far from supporting the conclusion that PL 280 requires Washington (or Montana) to amend its constitution, *Kennerly* supports just the opposite conclusion. See also this court's statement in *Seymour v. Superintendent*, 368 U.S. 351 at 357, note 13:

> "This Act [Act of July 24, 1956, 70 Stat. 626] followed closely a 1953 Act, 67 Stat 588, 590, § 7 of which provided a way in which the State of Washington could acquire jurisdiction over the reservation by meeting certain conditions prescribed there by Congress." (Emphasis supplied)

federal government itself. Congress wanted no more of it.

On the other hand, the Congress did not wish to create impediments or barriers, as a matter of federal law, if none existed as a matter of state law. Removal of federal barriers, not their creation or preservation, was the theme. The policy of Congress, in short, was not as schizophrenic as the United States and the Tribe imagine it to be.

4. *The Meaning of "The Consent of the People" as Used in Article XXVI of the State Constitution.*

If our submission so far be correct, § 6 contemplates the passage of a constitutional amendment if, and only if, a constitutional amendment is necessary as a matter of state law. And our supreme court has uniformly held that such an amendment is not necessary.

We are not here arguing, however, that the disclaimer clause in Article XXVI need not be made inoperative—though we shall so argue subsequently. That argument turns on the meaning of the "absolute jurisdiction and control of the Congress" disclaimer clause language. Does that language encompass jurisdiction of the type contemplated by PL 280? We here assume, *arguendo*, that it does, and address a quite different question: How can that clause be made inoperative, *as a matter of state law*, without an actual constitutional amendment.[32]

[32]Whether that language encompasses jurisdiction of the type contemplated by PL 280 is discussed in Appendix A.

Strictly speaking, the question is irrelevant. If, as our supreme court has held repeatedly, a constitutional amendment is not necessary to make the clause inoperative, that is the end of the matter. We examine the question, nevertheless, to show the reasonableness of those decisions of our supreme court.

The structure of Article XXVI should first be noted. Article XXVI does not begin by saying, "The people inhabiting this state do agree and declare that they forever disclaim [etc.] * * *" If that were how it actually began, then it would remain effective, unless and until repealed, as is the case with most other constitutional provisions.

But, Article XXVI actually begins by stating: "The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

"That the people inhabiting this state do agree and declare that they forever disclaim [etc.] * * *"

In this respect, Article XXVI is not unlike Article XXII, relating to legislative apportionment. Section 1 reads:

> "Until otherwise provided by law, the state shall be divided into twenty-four (24) senatorial districts, and said districts shall be constituted and numbered as follows: * * *"[33]

[33]Such a structure is not unknown in the Federal Constitution. Section 1 of Amendment XX reads:

> "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, *unless they shall by law appoint a different day.*"

For Article XXII to become inoperative, it is not necessary to repeal it through a constitutional amendment. All that is necessary is legislative action. Article XXII remains as part of the constitution; but, by its terms, it has been superseded by statute.

So too with the disclaimer clause in Article XXVI. It can become inoperative, while still remaining "on the books." The consent of the people must be given, of course, before this can occur. But how that consent is to be manifested is a question of state law, not federal.

Yet the concept of "the people" acting through their elected representatives is not a stranger to federal law. In fact, that concept is embodied in §§ 6 and 7 of PL 280.

The proviso in § 6 reads as follows:

> "* * * PROVIDED, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State *until the people thereof have appropriately amended their State* constitution or *statutes* as the case may be." (Emphasis supplied)

Section 7, in turn provides:

> "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner *as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.*" (Emphasis supplied)

The use of the term "the people of the State" in § 7 is explained by the United States as follows:

> " * * * To be sure, some confusion is created by using the same words [the people] in Section 7, where, presumably, the legislature alone is authorized to 'obligate and bind the State.' This may be a mere slip of the pen, unthinkingly reproducing the formula of Section 6. * * *" US Br. p. 35.

Congress should not be presumed to engage in making "slip[s] of the pen." And the confusion is dispelled by admitting the obvious: Congress fully recognized that "the people" could act through their elected representatives. The state supreme court come to the same conclusion, as a matter of state law.

5. *The Meaning of Section 6 in the Light of Section 404 of the 1968 Civil Rights Act (PL 90-284, 82 Stat. 79).*

Our next submission on the disclaimer issue is also, happily, short. Whatever questions might remain as to the meaning and application of § 6 have been put to rest by § 404 of the 1968 Civil Rights Act.

Our starting point is *Bryan v. Itasca County*, 426 U.S. 373.

The issue before the Court was the application of § 4 of PL 280, conferring civil jurisdiction upon Minnesota and the other four mandatory states

> "* * * Section 402 of Title IV, 25 USC § 1322 * * * tracks the language of § 4 of Pub L 280. Section 406 of Title IV, 25 USC § 1326 * * *, which provides for Indian consent, refers to 'State jurisdiction acquired pursuant

to this subchapter with respect to criminal offenses or civil causes of action. * * *' It is true, of course, that the primary interpretation of § 6 must have reference to the legislative history of the Congress that enacted it rather than to the history of the Acts of a later Congress. Nevertheless, Title IV of the 1968 Act is intimately related to § 4, as it provides the method for further state assumptions of the jurisdiction conferred by § 4, and we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments. Moe v. Salish & Kootenai Tribes, 425 US, at 472-475. * * * It would be difficult to suppose that Congress in 1968 intended the meaning of § 4 to vary depending upon the time and method by which particular States acquired jurisdiction. * * *'" 426 US at 386, 387.

Just as § 402 of the 1968 Act tracks § 4 of PL 280, § 404 of the 1968 Act likewise tracks § 6 of PL 280, almost word-for-word. (Section 404 is reproduced at US Br. pp. 21a, 22a.) The point made in *Bryan* is equally applicable here; it is difficult to suppose that Congress in 1968 intended the meaning of the same words to vary, depending upon the time a particular state assumes jurisdiction.

Congressional reenactments carry with them both the administrative and judicial constructions applied to their statutory predecessors. *Commissioner v. Noel*, 380 U.S. 678, 681, 682 (administrative construction) and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 279 (judicial construction). The uniform judicial construction placed upon § 6, prior to 1968, was the same as that placed upon it later;

no constitutional amendment was necessary for a state to assume jurisdiction. *State v. Paul*, 53 Wn.2d 789,337 P.2d 33 (1959) app. dism'd. 361 US 898. *Quinault Tribe v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), cert. den. 387 U.S. 907. And the construction placed on § 6 by the United States at the time of *Quinault* was this:

> "The plain purpose of Section 6, however, was "to remove any legal impediments to the assumption of * * * jurisdiction" (see S. Rep. No. 699, 83d Cong., 1st Sess., pp. 6-7; H. Rep. No. 848, 83d Cong., 1st Sess., pp. 6-8), and we believe that Congress intended thereby to leave to State law the procedure whereby impediments attributable to State law might be overcome. Washington's decision that a statute satisfies the requirement of its constitution that the cession of jurisdiction be revocable with the consent of "the people of" the State is a reasonable one, and it was properly honored by the court below."

Memorandum for the United States in *Quinault*, No. 1040, O.T. 1966, p. 7.

Section 404 of the 1968 Act incorporates this construction, be it labelled "judicial," or "administrative," or both, and thereby under *Bryan* reinforces the applicability of that construction to § 6 itself.

Nor is this all. As we shall show in detail in discussing the issue of partial jurisdiction (pp. 42-54, *infra*), during the extensive hearings which preceded the adoption of the 1968 Act, Congress was made very much aware of the complaints of some Indian Tribes in Washington, not only with respect to the

partial jurisdiction issue, but with respect to the disclaimer issue as well. What the Tribes had failed to win in court, they tried to win in Congress. But, as we shall demonstrate at pp. 46-54, *infra*, they failed in that forum as well.

6. *The Effect of the Disclaimer Clause, as Embodied in the Enabling Act and the State Constitution.*

Under our submissions so far, the precise effect of the disclaimer clause in the Enabling Act is not an issue; for whatever that effect was, PL 280 itself eliminated it. The intent of Congress in 1953, not in 1889, is the critical issue. And whether the state constitutional counterpart in Article XXVI constitutes an impediment to assuming jurisdiction, independently of the now defunct enabling act, is a moot question, because that constitutional provision has been made inoperative. Still, we discuss the problem.

There are two aspects to the problem; one geographical and the other substantive. To what type of lands does the Enabling Act's disclaimer clause apply? And what is the substantive legal effect on lands of that type?

We here take up only the first question, the geographical scope of the disclaimer clause.[34]

We start with the language of that clause:

[34]Because of our answer to this first question, the second question, relating to the substantive legal effect of the disclaimer, takes on much less practical importance. In the interest of completeness, we do discuss this second question, but in Appendix A.

> "* * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits *owned or held by any Indian or Indian tribes;* and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;* * * *"
> (Emphasis supplied)

The Enabling Act language speaks of lands "owned or held by any Indian or Indian tribes;" it then speaks of "said Indian lands." It does not refer at all to lands owned or held by non-Indians, such as nontrust lands. Note also that it does not mention Indian reservations at all. It makes no distinction between Indian lands inside a reservation and those outside.

Yet the United States assumes that " * * * the territorial scope of the disclaimer provisions reaches all Indian country as defined in 18 U.S.C. 1151." U.S. Br. 40, note 26. That definition, of course, includes every acre within an Indian reservation, no matter what the state of its title. This assumption of the United States is wrong; it is completely contrary to the plain language of the disclaimer clause.

The United States further states in that same footnote:

> "But that question need not be resolved here since the 1963 Washington statute clearly pur-

> ports to reach Indians on their trust lands with respect to some matters."

"That question" is not so easily avoided. That same statute (RCW 37.12.010) also reaches Indians on non-Indian lands and non-Indians on both Indian and non-Indian lands. Even if this court should find that the disclaimer clause still has operative effect, it affects Indians on their trust lands; that is all it affects. By its terms it cannot affect the remaining reach of RCW 37.12.010. And that reach was of vital concern to the Washington legislature. Where the Indian population was concentrated—on trust lands—the legislature recognized a degree of Indian interest in self-government which the Congress ignored. The vast majority of the non-Indian population, however, lives on nontrust lands; law enforcement problems there obviously were of grave concern to the legislature as there and there only it assumed full subject matter jurisdiction without tribal consent. And that jurisdiction remains a matter of great concern to the state and the county.

III. THE WASHINGTON SYSTEM OF "PARTIAL" JURISDICTION IS AUTHORIZED BY PL 280

A. General Considerations.

1. *The Decision Which Washington Actually Made in 1963.*

Our starting point, once again, must be the decision which the Washington legislature actually

made, in 1963. See pp. 7-12, *supra*, and Wash. Br. pp. 33-36. The question to be answered is whether PL 280 permitted *that* decision.

The United States asserts:

> "If the States were free to pick and choose, there was a risk that some might not take the sour with the sweet, leaving the national government with the most burdensome obligations." U.S. Br. 73, 74.

True enough. The State of Washington, however, did not "pick and choose," or try to avoid the "sour" while taking the "sweet." It obligated and bound itself to take everything, both sweet and sour.

The State did, however, allow the tribes a limited right to "pick and choose." The national government would be completely relieved of any burdensome obligations, but only if the tribe so chose.[35] The question is whether, in allowing this tribal choice, the state violated PL 280.

2. *The Meaning of "In Such Manner" in Section 7.*

The United States misses the mark again in its discussion of § 7, which permits an option state "to

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[35]Even if the Tribe did not so choose, the State effectively ended up with the bulk of the sour, and thereby relieved the federal government of its most burdensome obligations in any case. On the Yakima reservation, for example, for offenses by non-Indians, law enforcement is completely a state responsibility. And the non-Indian population outnumbers the Indian by a factor of almost eight to one. Further, on nontrust lands, the state has complete responsibility for law enforcement, whether the offender be Indian or non-Indian. The federal government is left only with responsibility for offenses by Indians—numbering about 3,000—on trust lands. But even a large chunk of that responsibility has been assumed by the state, viz., traffic offenses. The remaining seven of the eight enumerated areas of jurisdiction involve primarily social services of various kinds—all of which are provided by the State.

assume jurisdiction at such time and *in such manner* as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

The United States asserts:

"But 'in such manner' cannot be made to do service for 'to such extent.' " U.S. Br. 70. That is not quite the point.

The United States gives its own explanation of the phrase in the sentence immediately preceding the one just quoted. And, strangely enough, it finally hits the mark.

"We may assume that 'in such manner' also condoned a procedure whereby the consent of the affected Tribes would be made a condition of assuming jurisdiction." U.S. Br. 70.

This is our point exactly; and Washington has adopted such a procedure. It did not, it is true, condition *all* jurisdiction on tribal consent. Some was so conditioned, and some was not. But that too, we submit, was permissible under the phrase, "in such manner." Nothing in that phrase suggests that a State which wishes to adopt tribal consent as a condition is required to do so either totally, or not at all.

3. *The Overall Goal of PL 280.*

The United States, quite correctly, insists that the overall goal of the Congress in enacting PL 280 was "to pull down the reservation fences that kept

out State law." US Br. 73. We make the exact same point in our discussion of the disclaimer issue. And again quite correctly, the United States continues: "That goal, obviously enough, argued for the fullest assertion of State jurisdiction." Ibid.

But did that goal, as embodied in PL 280, prohibit a state from leaving to the tribes an element of choice, as Washington has done? The United States appears to concede that conditioning *any* jurisdiction on tribal consent, as did Washington in its 1957 Act, would be consistent with that goal. As we have just seen, that is precisely the United States' reading of the phrase "in such manner." But as shown by Washington's experience under the 1957 Act, the result on many reservations was no transfer of jurisdicton at all. The congressional goal was completely frustrated on those reservations.

Why then should a state be prohibited by PL 280 from adopting a system—as Washington did in 1963—which would result in at least partial attainment of that goal and, the Tribe willing, complete attainment?[36]

It would be completely unrealistic for us to suggest, of course, that the Congress in 1953 consciously considered the precise system which Washington would adopt in 1963. Similarly, it is completely un-

[36]The irony in the position of the United States should not go unnoticed. The United States fashions an argument based upon the admitted goal of "pull[ing] down the reservation fences that kept out State law." U.S. Br. 73. Yet acceptance of that argument would result in the complete reconstruction of these fences, and absolute frustration of that goal.

realistic for the United States and the Tribe to suggest that the same Congress consciously considered and rejected it.

Fortunately, however, we need not treat the problem solely as one of attempting to discern Congressional foresight. For in 1968, Congress acted again, with the benefit of a great amount of hindsight. Between 1963 and 1968, the appropriate committees of Congress were made quite aware of what Washington had done in 1963; the Indians missed no chance to tell them. And in 1968, the Congress deliberately chose to preserve the *status quo*. There were to be no more assumptions of state jurisdiction, at least without tribal consent. But prior assumptions were to be kept intact. Congress declared a draw.

We turn briefly to that 1968 action by the Congress and its background.

B. **The significance of Section 403 of the Civil Rights Act of 1968.**

Section 403 reads as follows:

"(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.
(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal."

The relevance of § 403, we admit, rests upon a presumption. We presume that the drafters of this provision had some very specific ideas about its scope and effect. Because both subsections of 403 refer to § 7 of PL 280, we further presume that the drafters had some very specific ideas about the scope and effect of § 7 itself.

The approach of the United States, in contrast, seems to be this: "What Congress thought about the scope and effect of section 7 in *1968* is legally irrelevant. What Congress thought in *1953* is the only real issue; and we really can't know that until the Court tells us, in this very case."

Note the United States in effect is now saying to the Congress itself: "When you enacted section 403, and were presumably deciding what you were accomplishing by enacting it, you were not entitled to rely upon our statements to you, in 1963 (Wash. Br. App. A) and again in 1968 (Wash Br. App. B), that PL 280 authorized partial jurisdiction. Nor were you entitled to rely upon the decision of the Ninth Circuit in *Quinault*, which squarely held that the jurisdictional system adopted by Washington in 1963, was valid under PL 280, and which we said was correct in our Memorandum to the Supreme Court." *Cf.* Memorandum for the United States in *Quinault*, No. 1040, O.T. 1966.

Such an approach, we submit, is completely contrary to that utilized by this Court in *Bryan v. Itasca County, supra.* (See pp. 37-39, supra) Further, the approach of the United States would mean, as a practical matter, that the Congress in 1968 was operating in the dark. It could not know what it was really accomplishing in 1968 unless and until this court later told it what it had accomplished back in *1953*, in enacting § 7 in the first place.

We suggest that the Congress in 1968 was entitled to have its own ideas as to the effect of § 7, when it embodied them in § 403, and that the intent of Congress in 1968 on this question is not only relevant, but controlling.[37] Section 403 was intended to have effect in certain states; which ones were they? Was Washington included?

In answering this question, the relationship between subsections (a) and (b) becomes important. If Washington is within the scope of subsection (a), it must be within the scope of subsection (b) as well —and vice versa. The reference in both to § 7 of PL 280 either brings Washington into the scope of both, or into the scope of neither. (The references to 18 U.S.C. 1162 and 28 U.S.C. 1360 in subsection (a) apply, of course, only to mandatory states. And there

[37]Under such cases as *Douglas v. Seacoast Products*, 431 U.S. 265, the Congress is presumed to be aware of—and indeed to have adopted —intervening judicial decisions when it reenacts a statute in substantially the same form as originally enacted. Our argument here is similar; Congress may be presumed to have been aware of intervening events, and to have taken them into account in 1968. As we shall show in our discussion of the legislative history of the 1968 Act, we here have more than just a presumption. (See pp. 49-54, infra)

is no reference in either subsection to § 6 of PL 280.)

This absence of a reference to § 6 is significant. Subsection (a) was obviously intended to include all states which had assumed jurisdiction under PL 280, whether they be optional or mandatory, and, if optional, whether they be disclaimer states or not. But if subsection (a) be all-inclusive— as surely it must be—two conclusions follow. First, the argument of the Tribe that § 7 has nothing to do with Washington is clearly wrong. (Tr. Br. 43, n. 56)[38]

Secondly, subsection (b) as well must be applicable to Washington. For the reasons previously stated, Washington cannot be within the scope of subsection (a), but outside the scope of subsection (b).

The legislative history compels the same conclusion; Washington was within the scope of subsection (b), and that subsection, accordingly, preserved the *status quo* in Washington.

The language of § 403 first appeared as § 3 of S. 966; see Hearings on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (hereafter "1965 Hearings"), pp. 9, 10. Senator Ervin was the

[38]The Tribe contends that only § 6, not & 7, is applicable to Washington. But § 6 was not repealed; and § 6, of course, does not require tribal consent as a condition for assumption of state jurisdiction. Under the Tribe's argument, Washington can now apparently take total jurisdiction without tribal consent, just so long as it amended its constitution. Such a result is absurd, of course, but it necessarily follows from the Tribe's premise.

prime sponsor of S. 966, and the explanation submitted along with his bill stated as follows:

> "Section 3 authorizes States, that have acquired civil and criminal jurisdiction over Indian country, to relinquish such jurisdiction to the United States.
>
> "This section repeals Public Law 280, which grants civil and criminal jurisdiction to States, but will not affect any cession of jurisdiction to a State prior to its date of repeal." (1965 Hearings, p. 11)

Mr. Arthur Lazarus, a prominent tribal attorney, stated his understanding as follows:

> "S. 966 *would not change the status quo in any State which already had taken over jurisdiction on Indian reservations pursuant to Public Law 280.* If such a State subsequently decided that it had made a mistake in taking over law enforcement in Indian country, however, the bill would authorize the United States 'to accept a retrocession' of that jurisdiction." (Emphasis supplied) (1965 Hearings, p. 67.)

Neither in Senator Ervin's explanation nor in that of Mr. Lazarus is there even a hint that the *status quo* was to be preserved in some states but not in others, such as Washington.

More importantly, the Yakimas themselves understood that S. 966 applied to them, for they fully supported it; and they further understood precisely the effect of § 3(b); for they wanted to change it. As they said in their formal statement:

> "In regard to S. 966, the Yakima Tribe does wholeheartedly support this legislation. *It would seem that provision should be further made that tribes now within State jurisdiction, without their consent, should be allowed to withdraw by petition to the Governor.*" (Emphasis supplied) (1965 Hearings, p. 245.)

Senator Ervin understood exactly what the Yakimas desired. Mr. Robert Jim, Chairman of the Yakima Law and Order Committee, is testifying:

> "Senator ERVIN. As I understand it, you think that no State should be permitted to assume jurisdiction over any tribe without the consent of the tribe.
>
> Mr. JIM. Yes.
>
> Senator ERVIN. And you favor the bill which has that provision in it. You would go further. You ask for the passage of a law which would give tribes the privilege of withdrawing from State jurisdiction when they have been made subject to State jurisdiction without their consent.
>
> Mr. JIM. Yes, sir." (1965 Hearings, p. 254.)

The Yakimas did not obtain the change they wanted, either then or later. Section 3(a) remained their only avenue for withdrawal.

The Makahs, a Washington tribe which has never consented to PL 280 jurisdiction, also understood that S. 966 applied to them. While the tribe did not focus on § 3(b) of S. 966, it did focus on § 3(a) (1965 Hearings, pp. 356-358) and found serious problems with it, as indeed the Tribe did with the whole bill.

> "However, while the principle of securing consent is admirable and has long been an objective of the various Indian tribes of the United

States, we must say that we feel that Senate bill 966 in its present form leaves most of the basic problems of Public Law 280 virtually untouched." (1965 Hearings, p. 356.)

In its comments on S. 966, the Interior Department did not focus on § 3(b). (1965 Hearings, p. 321) However, it will be recalled that in 1963, Interior had told the Chairman of the Senate Interior Committee that, in its view, PL 280 allowed partial jurisdiction by geographical area or subject matter. (Wash. Br. App. A) Thus the Senate could safely presume, in 1965, that Interior viewed Washington's jurisdictional system, as applied to the Yakimas, as well within the scope of § 7 of PL 280 and therefore within the scope of § 3(a) and (b) of S. 966 as well.[39]

The disclaimer problem did not escape notice during the 1965 hearings. The Quinaults, the Yakimas, the Washington State Indian Council, and the Makahs all argued that Washington was required to amend its constitution in order to assume any jurisdiction under PL 280. (1965 Hearings, p. 101 (Quinaults), p. 242 (Yakimas), pp. 246, 247 (Washington State Indian Council), p. 357 (Makahs)). They all argued to no avail.

Observe also that the committee was familiar with the jurisdictional system adopted by Washington in 1963; for the Yakimas had discussed it extensively. (1965 Hearings, p. 243.) Yet nothing was done to satisfy these complaints, save what had already been done in S. 966. Further assumptions of jurisdiction could be taken only with tribal consent; but prior assumptions could be voided only with state consent under § 3(a). So far as the 1965 Hearings reveal, that was all that was done for the Washington tribes. The *status quo* was still preserved, under § 3(b).

[39]The federal government has changed its view on this question only with *this* case. Cf. US v John, ... U.S. ....., decided June 23, 1978.

We turn to the 1968 hearings in the House, Hearings on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968). (Hereafter, "1968 Hearings")

The bills under consideration were S. 1843, which had already passed the Senate, H.R. 15122, which was identical, and a similar bill, H.R. 15419. Section 3 of S. 966 had become § 303 of the first two bills, S. 1843 and H.R. 15122.

The House Committee in 1968, like the Senate Committee in 1965, knew exactly the jurisdictional system adopted by Washington in 1963. Interior described that system in a letter to the committee and enclosed a copy of the Washington statutes. (1968 Hearings, p. 29)

And once again, as was the Senate Interior Committee in 1963, the House Commiteee was informed of Interior's view as to the validity of partial jurisdiction under PL 280. Partial jurisdiction was valid and Washington was pointed out as one of the states which had taken it. (Wash. Br. App. B; 1968 Hear-

ings, p. 25.) Thus, once again, the committee in charge of the bill was led to believe by Interior that Washington's assumption of jurisdiction was valid, and would therefore fall within the language of what is now § 403.

Nor did any other witness suggest otherwise. For example, Mr. Lazarus again noted that "The proposed statute would not change the status quo in any State which had taken over jurisdiction on Indian reservations pursuant to Public Law 280." (1968 Hearings, p. 116.)

To conclude, our review of the legislative history: If that imaginary stranger we have spoken of earlier (*supra*, p. 25) had asked either the Senate Committee in 1965 or the House Committee in 1968 whether the language now found in § 403 of the 1968 Act applied to the State of Washington, the answer would have been: "Of course." And if he had further asked: "What is its effect in Washington?" the answer would have been: "To preserve the *status quo*."

IV. THE TRIBE'S ASSERTIONS THAT RCW 37.12.010 IS VAGUE AND THAT PL 280 DOES NOT APPLY TO THE YAKIMAS ARE NOT LEGITIMATE ISSUES IN THIS CASE.

The Tribe asserts that RCW 37.12.010 should be declared void as violative of the standard of definiteness of the Due Process Clause of the Fourteenth Amendment. (Tr. Br. 80-83) It argues that the eight enumerated areas in that section, over which the

State has taken jurisdiction over members of the Yakima Indian Nation, even though on tribal or allotted land, are themselves vague, and that a tribal member *might* be unable to ascertain whether his conduct is punishable under the laws of the state of Washington because he or she is uncertain as to whether or not that conduct is encompassed by one or more of those eight areas.

The Tribe also urges that jurisdiction assumed by the State of Washington pursuant to PL 280 is invalid because PL 280 itself is inapplicable to the Tribe by reason of certain treaty provisions. (Tr. Br. 29-38.)

As a threshhold matter, these questions should not now be considered by the court. In its order of February 27, 1978, noting probable jurisdiction, the court directed the parties to address the following issue:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Nowhere in that order is the due process clause in general, or the question of vagueness in particular, mentioned. The court has thus limited the issues to be discussed to those specifically set out in the order.

Likewise, nowhere in that order is the question

asked, "Does Public Law 280 violate the terms of the Yakima Treaty?"

Nevertheless, we briefly examine the merits of both questions.

A. **The Vagueness Question.**

The Tribe itself does not have standing to challenge the Washington Act as vague. The Yakima Tribe is not a defendant charged with having violated a crime, and it is highly doubtful that the Tribe, as an entity, could ever be a criminal defendant. It is instead seeking a declaratory judgment that the act is void because some future criminal defendant *might* be charged with a crime for which he *might* not have received adequate notice of criminal nature. This court has clearly stated that in such a case relief does not lie. See *Younger v. Harris*, 401 U.S. 37; *Samuels v. Mackell*, 401 U.S. 66; and *Boyle v. Landry*, 401 U.S. 77, all decided on the same date in 1971. Taken together, those cases clearly stand for two propositions: First, that one challenging a state statute for vagueness must have been charged under that statute to have standing to challenge it; and, secondly, that the proper manner for presenting a vagueness question is as a defense to the criminal charges in state court, followed ultimately, if necessary, by an appeal to this court. That is also the proper way of challenging the supposed vagueness of RCW 37.12.010. It is inappropriate for this court to render a decision on the definiteness or vagueness of

RCW 37.12.010, before the state courts have ever had an opportunity to, or indeed have been asked to, construe the statute.[40]

Tribal reliance on *Bigelow v. Virginia*, 421 U.S. 809 is misplaced. In that case this Court simply held that the offending Virginia statute was overbroad as to Mr. Bigelow himself, who, indeed, had already been convicted and sentenced under the statute. This case, in contrast, involves only a suit for declaratory relief; criminal charges have not been filed here.

Even if vagueness were a legitimate issue in this case, and if the Tribe had standing to assert it, the statute could not be found to run afoul of the vagueness doctrine. As the trial court correctly pointed out, the statue does not define crimes, it merely authorizes the extension of state jurisdiction. See, Trial Court Opinion on Motions for Summary Judgment, App. p. 8. To indicate the areas to which the State was extending its jurisdiction over Indians on their trust lands, in all cases, the legislature used either explicit language, such as "operation of motor vehicles upon the public streets, alleys, roads and highways:," or phrases of common understanding, such as "mental illness" and "juvenile delinquency." That language is certainly no less clear than the phrase "unreasonably low prices," approved by this Court in *U.S. v. Na-*

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[40]See also The Void For Vagueness Doctrine In The Supreme Court, 109 Univ. of Pa. Law Review 67 (1960), by Professor Anthony G. Amsterdam. The author discusses the question of standing to argue vagueness on pp. 97-104 of the note, and concludes that in order to challenge a statute as vague or overreaching, a litigant must still be one *as to whom it is vague* or whom it may overreach.

tional Dairy Products Corp., 372 U.S. 29 or "non-Indian community," discussed by the Court in *U.S. v. Mazurie*, 419 U.S. 544, a term which defined jurisdictional limits, as does the language complained of here.

If the Tribe's argument is taken to its logical extreme, in order to have legislated constitutionally in assuming jurisdiction, the State would have been required not only to state in what areas it was assuming jurisdiction, but also to specifically set forth those sections of state laws which prescribe criminal penalties for forbidden conduct. For example, under the tribal argument, to give a member of the Tribe reasonable notice that the State intended to exercise its jurisdiction when one attained the status of "juvenile delinquency,"[41] it would be necessary to set out in detail the dozens of sections found in Title 13 RCW, "Juvenile Courts and Juvenile Delinquents," or to set out in detail and define the numerous kinds of conduct which would constitute criminal offenses or which might otherwise place one in the status of being a juvenile delinquent. This would require hundreds of pages. The constitution does not require impossible standards. *U.S. v. Petrillo*, 332 U.S. 1 (1947).

[41]We here emphasize that "juvenile delinquency" is a *status;* and that status can be acquired by violating even *federal* law. See, *e.g.*, RCW 13.40.020(11) and (14). *Cf.*, also RCW 13.40.240. Thus, contrary to the suggestion of the United States (U.S. Br. Appendix B, Chart 2), a minor Indian son who, along with his father, commits burglary on trust lands has, like his father, violated 18 U.S.C. 1153, the Major Crimes Act, and not state law. But that son, because of his status, is subject to the procedures contained, *e.g.*, in chapter 13.40 RCW, which are essentially rehabilitative in nature.

B. The Applicability of PL 280 to the Yakimas.

The Tribe asserts that Congress did not expressly abrogate its purported treaty right of self-government, (Tr. Br. 30-36) and that Congress cannot delegate its federal duty to Indians to the states. (Tr. Br. 36-38)[42]

Congress' power to allow the states to increase jurisdiction over Indians, even to the exclusion of tribal powers of self-government, cannot be doubted. It is undisputed that Congress has plenary authority to legislate for the Indian tribes in all matters, including this form of government, *U.S. Wheeler*, ... U.S. ....., decided March 22, 1978. It is also clear that Congress can nullify the effects of a treaty's provisions, without rewriting the treaty.

In *Lonewolf v. Hitchcock*, 187 U.S. 553, 566, 568, this Court, dealing with the validity of accession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent, held:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interests of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians

[42]We here assume that the Tribe is asserting invalidity only as to federal authorization of state jurisdiction over Indians. (Tr. Br. 20) Congress' transfer to the states of jurisdiction over non-Indians does not affect any tribal interest in self-government. *Oliphant v. The Suquamish Indian Tribe*, ... U.S. ....., decided March 6, 1978.

it was never doubted that the power to abrogate existed in Congress. * * *
* * *
* * * In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.

See, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594.

The Tribe contends that, while Congress' power cannot be doubted, the question is whether the congressional intent manifested in PL 280 supported a finding of abrogation of the supposed treaty right of self-government. In all cases, the face of the act, the surrounding circumstances and the legislative history are to be examined to determine what congressional intent was. *Rosebud Sioux Tribe*, supra at 587.

We have sufficiently examined these factors in prior portions of this brief, pp. 22-33, supra; they all lead to one conclusion: Congress intended that PL 280 be applicable to *all* states and to *all* reservations, except to the extent reservations were expressly excluded, as in §§ 2 and 4 of PL 280. S. Rep. No. 699, 83rd Cong. 1st Sess. (1953) pp. 5-6.[43]

V. ALTERNATIVE POSSIBLE DISPOSITIONS.

If our principal submissions are correct, the disposition of this case is simple. The court below should be reversed, and the judgment of the trial court reinstated. If, however, certain of those submissions are

[43]The Senate Report adopts the House Committee Report on PL 280, H. Rep. No. 848, verbatim.

rejected, the appropriate disposition becomes a more complicated matter. For that disposition should not be a complete invalidation of the Washington jurisdictional system.

We here discuss the alternatives.

A. The Disclaimer Issue.

If the disclaimer clause, as embodied in the Enabling Act, remains in force, that force should be limited to the terms of the clause. And under those terms, the clause is limited in its application to Indian or trust lands, and to Indians thereon. Accordingly, the only portion of the State's jurisdiction over the Yakima reservation which is affected by this argument is the eight enumerated subject matters on trust lands; the remaining reach of RCW 37.12.010 is still valid. And we consider this remainder a vital element of Washington's jurisdictional system—to non-Indians wherever they be found, and to Indians on nontrust lands, which in all likelihood will be non-Indian lands.

True, the State would face some difficulties, *e.g.*, in attempting to prosecute for welfare fraud and in enforcing the compulsory school attendance laws. But the State would still provide social and welfare services to the Indian. The consequences would not be so disastrous as they would be if the entire reach of the jurisdictional scheme were invalidated.

B. **The Partial Jurisdiction Issue.**

If Washington's partial jurisdiction by subject matter is held to violate the terms of PL 280, the result would be that described above: Only the eight enumerated subject matters would be stricken.

If, however, Washington's partial jurisdiction by geographical area, as well as its partial jurisdiction by subject matter, is held to violate PL 280, a more difficult problem is presented. The alternatives, we believe, would be invalidation of the jurisdictional system *in toto*, or the severance of the tribal option. Under the second alternative, RCW 37.12.010 would, in effect, read as follows:

> "The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session) * * *"

If the choices given the states by Congress in passing PL 280 were only two, everything or nothing, and if the overriding goal of Congress was a transfer of everything from the federal government to the State, severance of the tribal option would be consistent with PL 280 and would certainly accomplish that goal.

The court below assumed that any severability issue is to be "determined by state standards." Juris. St. App. A, p. 35, n. 9. We believe this assumption to be correct.

We would not hazard prediction as to how the state supreme court would decide this severability issue. But it could well be guided by RCW 37.12.050, which states:

> "The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.)

This language could well be an indication to the supreme court that the goal of Congress in passing PL 280 was the goal of the state legislature as well, and that once the "limitations and provisions" of PL 280 have been made clear by this Court, only the offending portions of the statute should be severed, so that the common goal would be accomplished.

In short, a proper disposition by this Court would be a remand to the Court of Appeals, with directions to refer the severability question to the state supreme court.[44]

[44]This referral could be made under chapter 2.60 RCW, the Federal Court Local Law Certificate Procedure Act.

CONCLUSION

In 1963 the Washington legislature was faced with a serious problem, affecting both its Indian and its non-Indian citizens. Both groups of citizens live together on Indian reservations and both, of course, participate fully in the lawmaking process of the state of Washington. They elect its legislators and its local officials, including sheriffs, prosecutors and judges. That these officials would be sensitive to the interests of both groups is only as expected.

In accommodating the interests of both groups, the legislature determined that state law should apply on those portions of reservations owned and occupied primarily by non-Indians, but that tribal choice as to applicable law should largely control on the Indian-owned portions of those reservations. It removed from that tribal choice only certain subject matters of obvious state concern, involving mainly various social services provided by the State.

The United States Department of Justice, unlike the Washington legislature, totally ignores the interests of all of the non-Indian citizens living on Indian reservations, just as it did in *Oliphant v. Suquamish Tribe*, ... U.S. ....., decided March 6, 1978. The Department's position here represents an unfortunate and recent about-face. Just as the United States had asserted for more than a century prior to *Oliphant* that tribal criminal law did not apply to non-Indians, so here the United States, from the passage

of PL 280 until the filing of this appeal, has told both Congress and this Court that Washington's jurisdictional system was valid.

The United States asserts that if Washington's system be invalidated *in toto* "* * * the 'unsettling' effect will be minimal and * * * the benefits would be substantial * * *." (U.S. Br. 11) We must ask: "For whom?" Certainly not for the non-Indians. Nowhere in its discussion of the "Practical and equitable considerations" does the United States so much as mention the impact upon non-Indians. (U.S. Br. 54-59, 87-88) From reading these pages one would assume that the 22,000 non-Indians on the Yakima Reservation and the even greater number on other reservations simply do not exist.

But they do exist. And the Washington legislature, in 1963, took a far broader and fairer view than does the United States now. The legislature devised a jurisdictional system which took the interests of both groups into account, and accordingly preserved, to the maximum degree feasible, Indian self-government. PL 280 did not require the legislature to do so; but neither did it prohibit the legislature from doing so.

The disclaimer issue aside, Washington's jurisdictional system would be unquestionably valid, ironically enough, had the legislature totally ignored the interests of the Indians and eliminated completely any element of tribal choice.

The system actually adopted is now under attack. And the basis of the attack is the legislature's decision *not* to ignore the Indians' interests, and to preserve, instead, Indian self-government. The attack should be rejected.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 1978, three copies of the Reply Brief for Appellants were mailed, postage prepaid, to James B. Hovis, Attorney at Law, 316 North Third Street, Yakima, Washington, 98907, counsel for appellee. I further certify that all parties required to be served have been served.

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APPENDIX A

THE MEANING OF THE PHRASE "ABSOLUTE JURISDICTION AND CONTROL" AS USED IN THE DISCLAIMER CLAUSE

The disclaimer clause reads:

> "* * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * *"

Does the language of this clause encompass jurisdiction of the type contemplated by PL 280? The United States, of course, contends that it does.

> "On its face, the provision plainly requires the new States to disclaim *both* any property interest over "Indian lands" *and* any jurisdiction to impose their own laws there." U.S. Br. 40. (Emphasis in original)

This distinction and the argument based upon it are not at all new, as seen from reading the case cited in the United State's very next sentence, *Draper v. United States*, 164 U.S. 240. (U.S. Br. 41)

The Court stated the argument as follows:

> "It is argued that as the first portion of the section in which the language relied on is found disclaims all right and title of the state to "the unappropriated public lands lying within the

boundaries thereof and of all lands lying within said limits, owned or held by an Indian or Indian tribes, and until the title thereof shall be extinguished by the United States, the same shall be and remain subject to the disposition of the United States," *therefore the subsequent words, "and said lands shall remain under the absolute jurisdiction and control of the United States," are rendered purely tautological and meaningless, unless they signify something more than the reservation of authority of the United States over the lands themselves and the title thereto."* 164 U.S. 245. (Emphasis supplied)

In rejecting this argument, the Court adopted a rationale which has a direct bearing on our question. The United States explains *Draper* as "carving out [a] special exception[s]" limited to offenses by a non-Indian against another Indian, as in *McBratney*. But the rationale of *Draper*, rather than providing an exception, destroys the rule itself.

After stating the argument as above, the Court continued:

> "This argument overlooks not only the particular action of Congress as to the Crow reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the Union." 164 U.S. at 245.

The "general law of the United States, as to Indian reservations" refers to the General Allotment Act of 1887, 24 Stat. 388, adopted two years before the Montana (and Washington) Enabling Act. The General Allotment Act "* * * contemplated the gradual extinction of Indian reservations and Indian

titles by the allotment of such lands to the Indians in severalty." 164 U.S. at 246. And § 6 of the Act provided that simultaneously with the allotment process, the Indian allottees would "* * * be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 164 U.S. at 246. The policy, in short, was a drastic one. The reservations and the tribes were to be broken up, and their members completely assimilated into non-Indian society.

At the same time, however, the Act placed restrictions on the power of the Indians to alienate their lands; a trust period was imposed. The purpose of the disclaimer clause was to "prevent any implication" (164 U.S. 246) that once jurisdiction was transferred under § 6, the state thereby gained any power to affect the Indian title by overriding these restrictions. State jurisdiction was to be complete, with one exception; federal jurisdiction was to control with respect to Indian title, until after expiration of the restrictions. (174 U.S. 246)[1] The purpose of the disclaimer clause was to assure preservation of these restrictions until they expired by their own terms.

The reason for the failure of the disclaimer clause to make any distinction between lands within and lands outside a reservation is also explained by the court. Under § 4 of the General Allotment Act,

[1]Observe that § 6 became effective *before* the expiration of the restrictions, not after. The apparent suggestion in our opening brief to the contrary (Wash. Br. 37, text accompanying note 15) is incorrect.

off-reservation Indians were to receive allotments, subject to the same restrictions on alienation as on-reservation allotments. The protection of the disclaimer clause was to cover these off-reservation lands as well. (164 U.S. 246)

The disclaimer clause, then, was designed for a situation in which "the Indians themselves would have passed under the authority and control of the state," 164 U.S. at 246, but their lands would remain subject to federal jurisdiction and control, *i.e.*, subject to the restrictions on alienation. Far from erecting barriers to general state jurisdiction over "the Indians themselves," the disclaimer clause contemplated a situation in which those barriers had been removed.[2]

So far as PL 280 is concerned, the disclaimer issue is settled. See pp. 18-22, supra. But if it is to be reopened, and if the meaning of the disclaimer language in the Washington Enabling Act becomes a question, *Draper* is dispositive on that question.

The United States is correct in suggesting that the Court has over the years "noticed" the disclaimer clauses and "treated" them as reserving to the United States jurisdiction of the type contemplated by PL 280. (U.S. Br. 42, and cases cited at pp. 42, 43)

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[2]The Dakota delegate, quoted at U.S. Br. 45, understood the effect of the disclaimer clause to be exactly as we have described it. "We are to recognize tribal relations in connection with Indians for only a very short time longer," i.e., until allotments were made in severalty, and § 6 was thereby triggered. But, with respect to the land itself, "* * * we cannot even lay out a highway over it * * * [or] exercise any right of emiment domain over the land. * * *" (20 Cong. Rec. 813 (1889)) The Dakota delegate was correct on all these points.

However, in those cases in which the meaning and effect of the disclaimer clause has been critical in the disposition of the case, the Court has examined that meaning carefully, and concluded that it does not contemplate PL 280 type jurisdiction. See *Draper*, *Village of Kake v. Egan*, 369 U.S. 60 and its companion case, *Metakatla Indian Community v. Egan*, 369 U.S. 45.

Admittedly, there is still some confusion because of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 176, n. 15, in which the *Kake* construction of the Alaska disclaimer was stated to be applicable only to non-reservation Indians. This statement in *McClanahan* overlooked the fact that the *Kake* construction was applied to *reservation* Indians in the companion case, *Metlakatla*. If the drafters of PL 280 were confused as to the correct meaning of the disclaimer clause, it is perfectly understandable. *Kake* and *Metlakatla* had not yet been decided. Indeed, the drafters might have reason to be confused even now, after the *McClanahan* gloss on *Kake*. The confusion can be dispelled by going back to *Draper*.

One last point. Adoption of the *Draper* and *Kake* construction of the disclaimer language would not result in the automatic removal of the federal barriers to state jurisdiction over reservation Indians in disclaimer states. For those barriers are created independently of any disclaimer clause. (*Cf.*, U.S. Br. 42) Thus, we have no disagreement at all with the statement in *McClanahan:*

> "It [the *Kake* holding] did not purport to provide guidelines for the exercise of state authority in areas *set aside by treaty for the exclusive use and control of the Indians.*" 411 U.S. at 176, n. 15. (Emphasis supplied)

As shown by *Metlakatla* itself, which involved a reservation created by statute (48 U.S.C. 358), though the disclaimer clause itself creates no barriers to state jurisdiction of the type envisioned by PL 280, such barriers certainly exist. They are created either by treaty provisions, as in *McClanahan*, or by statute (or administrative action thereunder) as in *Metlakatla*. The *Kake* and *Draper* construction of the disclaimer clause does not even purport to remove such barriers; they can be removed only by an act of Congress, such as PL 280.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

At this late date, it is hardly necessary to state the traditional and continuing responsibility of the federal government for the welfare of Indian Tribes. It may be appropriate, however, to note the reasons that especially call for our participation in this particular case.

First, of course, the Court itself invited our views at the jurisdictional stage. Having, in response, urged the Court to note jurisdiction and to give the case plenary consideration, it would seem appropriate that we contribute a brief on the merits. The case, moreover, involves the construction of a federal statute which is administered, in important part, by agencies of the United States. There are immediate practical considerations as well. The litigation directly implicates federal law enforcement responsibilities, for, if the judgment is affirmed, much of the jurisdiction relinquished by the State will return to the federal government—at least until new consensual arrangements are made.

But there is yet a further ground for our appearance—which also perhaps excuses the unusual length of the present submission. It is that, on earlier occasions, both the Department of the Interior and the Department of Justice have voiced views at odds with those expressed here. In those circumstances, we owe it to the Court, and to the parties, to explain in some detail the reasons that have impelled us to this change of position.

STATEMENT

In the district court, a substantial factual record was made to support, or disprove, the charge that, in practice, the State of Washington denied the equal protection of its laws to Indians within the Yakima Reservation. But that is not the issue in this Court. Certainly, it is not the question we address. The controversy is no longer confined by the particular factual situation prevailing on the Yakima Reservation. While the context remains relevant, the issues are now more broadly stated, primarily turning on the proper construction of Public Law 280 and the constitutional validity of the Washington statute on its face.

For this reason, and because we fully discuss the reach of both the State and federal legislation in the argument that follows, we outline the background of the litigation very briefly.

1. The Yakima Indian Reservation is located in the State of Washington. The Reservation consists of approximately 1,387,505 acres, of which about 80 percent is held in trust by the United States for the Tribe or individual members. The remaining parcels of land, some 270,895 acres, are held in fee and scattered in "checkerboard" fashion throughout the Reservation. More than 5,000 members of the Yakima Indian Nation permanently live on the Reservation, and that number increases during the summer months. There are some 22,000 other residents, almost half

of them living within the municipal boundaries of Wapato, Toppenish and Harrah.

Since 1855, when it was established, and until a decade and a half ago, except only for matters that did not affect Indians, disputes arising within the Reservation were resolved by federal and tribal authorities. In 1953, however, Congress enacted Public Law 280, 67 Stat. 588 (*infra*, pp. 7a-11a), permitting all States to assert jurisdiction within Indian reservations, provided prescribed procedures were followed. Invoking that authority, the Washington legislature, in 1957, undertook to assume both criminal and civil jurisdiction over any Tribe that requested it. Laws of Washington, 1957, ch. 240 (*infra*, pp. 12a-14a). The Yakima Indian Nation made no such request and was accordingly not affected.

But, in 1963, the Washington legislature enacted a new law providing for limited State jurisdiction without tribal consent. Laws of Washington, 1963, ch. 36, now RCW §§ 37.12.010-070 (1964) (*infra*, pp. 15a-18a). Henceforth, in the case of a nonconsenting Tribe, like the Yakimas, the State assumed full civil and criminal jurisdiction over unrestricted lands, but elsewhere within reservations asserted jurisdiction over Indians only with respect to eight categories of subject matter. We have sought to particularize the consequences of this legislation for criminal cases in an appendix (*infra*, last fold-out page).

In 1968, Congress amended Public Law 280 so as to preclude, for the future, unilateral State assertions of jurisdiction over Indian country without the consent of the Tribes (*infra*, pp. 19a-23a). Although States were encouraged to retrocede jurisdiction already acquired, they were not required to do so. Accordingly, Washington's action in 1963 is unaffected by the new legislation and must be judged under Public Law 280 as it then read.

2. The Yakima Indian Tribe filed this suit in the United States District Court for the Eastern District of Washington seeking a declaration that the partial assertion of state jurisdiction over its reservation was invalid and an injunction against the continued exercise of such jurisdiction. The Tribe contended (1) that Public Law 280 did not permit a partial assumption of jurisdiction either by geography or subject matter, and (2) that the State had failed to comply with the requirement of Public Law 280 that it amend its constitution before asserting any jurisdiction over Indian lands within the State. The Tribe also argued that the partial assumption of jurisdiction by geography and subject matter, even if authorized by Public Law 280, violated constitutional requirements of due process and equal protection. Finally, the Tribe contended that any State jurisdiction was at most concurrent with tribal jurisdiction.

The district court denied relief. On the issue of the State's compliance with Public Law 280, the court

held (A. 5, 6, 11, 26-27, 31)[1] that it was bound by the decision of the Ninth Circuit in *Quinault Tribe of Indians* v. *Gallagher*, 368 F.2d 648, certiorari denied, 387 U.S. 907, determining that the State, without amending its constitution, could assume partial geographic and subject matter jurisdiction over Indian reservations where the tribes had the option of requesting that full jurisdiction be assumed. Although noting evidence that subjection to state jurisdiction caused "disadvantages" for Yakima Tribe members (J.S. 63), the court also held that the "fundamental constitutional right of equal protection is not shown to have been violated" (*id.* at 64).

The court of appeals, sitting *en banc*, adhered to its decision in *Quinault Tribe of Indians* v. *Gallagher*, *supra*, that Public Law 280 allowed the assumption of partial subject matter and partial geographic jurisdiction. Finding that "the applicable legislative history of PL-280 provides reasonable support for *Quinault*" (J.S. 44), and stating that "reversal of *Quinault* * * * at this late stage, along with a new interpretation of PL-280, could lead to unfortunate law enforcement problems for thousands of native Americans" (*id.* at 40), the court declined to "overturn a reasonable interpretation of an ambiguous statute understood for a generation to be the law when the consequences of so doing are so uncertain

[1] The Jurisdictional Statement does not include the opinions and orders of the district court rejecting the contentions advanced under Public Law 280. However, they are now printed in the joint Appendix.

and far-reaching" (*id.* at 45). The court noted, however, that "Washington's checker-boarding of criminal jurisdiction might appear particularly inefficient and that its elimination may be desirable" (*ibid.*).

Five dissenting judges concluded that *Quinault* should be overruled. They noted Congress' recognition that "checkerboard" jurisdiction was "antithetical to effective law enforcement" (*id.* at 53) and pointed out that even the State had agreed that "[t]he Yakimas have no effective law enforcement on their reservation" (*id.* at 54). The dissenters also relied on the legislative history of the 1968 amendments to Public Law 280, which they said indicated that partial subject matter jurisdiction had not previously been authorized (*id.* at 58).

On remand from the *en banc* court, a panel of the court of appeals turned to the constitutional issues and held that Washington's partial assumption of jurisdiction on the basis of "land-title classification" (*i.e.*, full jurisdiction over fee but not over non-fee land) violated the equal protection clause of the Fourteenth Amendment (J.S. 33). The court noted that a Yakima Indian living on non-fee land was denied law enforcement protection from the State of Washington on that basis alone, while a Yakima Indian living on an adjoining parcel of fee land received protection (*ibid.*). This discrimination, the court held, lacked a rational basis because "[t]he state's interest in enforcing criminal law is no less 'fundamental' or 'overriding' on non-fee lands than on fee

lands," and "[n]o showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement" (*id.* at 35). The court further concluded that the unconstitutional provision was not severable from the remainder of the statute and, hence, that "the whole statute must be rewritten" (*id.* at 36).

ARGUMENT

INTRODUCTION AND SUMMARY

As we have noticed, the court of appeals on remand reached the constitutional question under compulsion of a holding by the full court rejecting the claim that the jurisdictional scheme imposed by the State of Washington in 1963 violated the terms of Public Law 280. This Court, of course, is not so handicapped and, in normal course, would address the constitutional issues only if that was inevitable. Indeed, since "the validity of an act of Congress is drawn in question" by the combined rulings of the court of appeals, we assume the Court will follow the "cardinal principle * * * [of] first ascertain[ing] whether a construction of the statute is fairly possible by which the question may be avoided." *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369, quoting from *Crowell* v. *Benson*, 285 U.S. 22, 62.

In our submission, it is unnecessary to reach the Equal Protection claim in this case. We so conclude because, in our view, Public Law 280 did not author-

ize Washington to assume the jurisdiction over the Yakimas it asserted by its 1963 enactment. On two independent grounds, we believe the State statute overstepped the boundaries announced by Congress in 1953.

1. We first address (*infra*, pp. 11-59) the question whether Washington was free to assume *any* new jurisdiction over Indian country without first removing, by the usual process of constitutional amendment, a disclaimer of jurisdiction embedded in the State constitution.

The State contends that this "disclaimer issue" is not before the Court, both because it is not comprised within the question set down for argument and because it is foreclosed by previous decisions of this Court. We examine those threshold objections, concluding that they are without substance. We also explain why this issue is one of federal law.

We then turn to the merits of the issue. Examining both the text and the legislative history of Public Law 280, we demonstrate that the Congress of 1953 believed certain States, including Washington, could not assume jurisdiction over Indian reservations until the "legal impediment" in their constitutions had been removed, and, further, that this would require submission of a constitutional amendment to the people of the State as a whole. And we conclude that, so believing, Congress wrote a discrete provision into Public Law 280 (Section 6) which not only permitted, but *required*, the disclaimer States to un-

dertake that procedure before asserting jurisdiction within Indian country.

Out of abundance of caution, we next consider the correctness of these congressional assumptions. This leads us to the Enabling Act of 1889 authorizing the admission of Washington and three other States into the Union on certain conditions, including the insertion into their organic acts of the Indian disclaimer provision. Both the text and the legislative history of the Act, we conclude, show that the affected States were intended to be disabled from importing their laws into Indian country. What is more, we show that the Congress of 1889 meant these disclaimers to be revocable only with the consent of the United States and of "the people" of the State, then understood as connoting the entire electorate.

Finally, we briefly address the concern expressed in some quarters that our submission, if sustained, would have very disruptive consequences. We point out how limited, in fact, the impact of such a holding would be, and, on the other hand, its tendency to diminish existing frictions, to end the present concededly inefficient and unsatisfactory confusion in law enforcement, and to promote more suitable consensual arrangements.

2. Our alternative submission (*infra*, pp. 59-88) is that Public Law 280 did not authorize the partial "checkerboard" assumption of jurisdiction attempted by Washington in 1963. Close examination of the text of the federal statute leads us to conclude that the so-called "option States" were given no different

choices, if they assumed jurisdiction, than the five States immediately extending their laws to Indian country. We note that nothing in the legislative history of the 1953 Act remotely suggests otherwise.

Nor do the materials underlying the amendment of Public Law 280 in 1968 suggest a different conclusion, in our view. At that date, partial assumption of jurisdiction, albeit with tribal consent, was expressly permitted for the future. We note that conflicting views were expressed as to whether this was a change in the law. But we conclude that the most authoritative congressional voices, taking the affirmative view, should outweigh the now repudiated opinion expressed by the Department of the Interior.

We then treat briefly the suggestion that Congress in 1968 ratified Washington's jurisdictional scheme, even if it was not authorized by Public Law 280 as originally enacted. That argument, we submit, finds no support in the text of the 1968 amendments or any other evidence of congressional intent.

Finally, we consider the practical consequences of a holding that partial assumption of jurisdiction over Indian country was not authorized before 1968. As before, we conclude that the "unsettling" effect would be minimal and that the benefits would be substantial.

I. THE DISCLAIMER ISSUE

We follow the court of appeals (J.S. 38, 39) in labelling as the "disclaimer issue" the question whether Public Law 280 authorized the State of

Washington to assert any new[2] jurisdiction within Indian reservations[3] without first amending, by the usual process, the provision of the State constitution that disclaims any competence over Indian country. The issue arises because of the somewhat complex structure of the 1953 Act of Congress, implementing another shift in our attitude to Indian autonomy.

The general scheme of Public Law 280 is well known. In five named States[4]—the so-called "automatic" or "mandatory" coverage States—Congress made a present cession to the State of full criminal and civil jurisdiction[5] over "Indian country," save for three exempted reservations. Sections 2 and 4, *infra*, pp. 7a-10a. The remaining States—the "option"

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[2] We say "new" in light of this Court's ruling in *United States* v. *McBratney*, 104 U.S. 621, and its progeny, that, notwithstanding disclaimers in Acts of admission, the several States always had jurisdiction to try non-Indian offenders committing crimes within Indian reservations when the victim was also non-Indian. That exception was reaffirmed in *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. See, also, *United States* v. *Antelope*, 430 U.S. 641, 643 n. 2, 644 n. 4, 648 n. 9.

[3] Strictly speaking, the question affects all "Indian country," including Indian communities outside a reservation. See 18 U.S.C. 1151. But we are here concerned only with reservation lands, all of which are part of "Indian country" regardless of the race of the owner and their restricted or unrestricted status.

[4] These are: California, Minnesota, Nebraska, Oregon and Wisconsin. A sixth State, Alaska, was later added. Act of August 8, 1958, 72 Stat. 545.

[5] There are limited exceptions which are not relevant here. See Sections 2 and 4, *infra*, pp. 8a, 10a, now 18 U.S.C. 1162(b) and 28 U.S.C. 1360(b). And see *Bryan* v. *Itasca County*, 426 U.S. 373.

States—were authorized to assume jurisdiction over "Indian country" within their borders if they chose. Sections 6 and 7, *infra*, pp. 10a-11a. But all "option" States are not dealt with in the same way. Of special interest to us is the sub-class of states with constitutional or statutory provisions disclaiming jurisdiction over "Indian country". These "disclaimer" States cannot assume jurisdiction of "Indian country" until "the people thereof have appropriately amended their State constitution or statutes as the case may be." Section 6, *infra*, pp. 10a-11a.

The State of Washington would appear to be one of the so-called "disclaimer" States, the State Constitution having always contained a provision disavowing "all right and title" to "all lands * * * owned or held by any Indian or Indian tribes" and asserting that such lands "shall remain under the absolute jurisdiction and control of the congress of the United States." Revised Constitution of Washington (1966), Art. XXVI, par. Second, *infra*, p. 4a. Since this constitutional disclaimer has never been removed by amendment, the question arises whether the Washington legislature could validly assert any jurisdiction within the Indian reservations in the State, as it purported to do in 1963.

Considerations of judicial economy, among others, counsel addressing this disclaimer issue first. Indeed, if Public Law 280 be construed as requiring the State of Washington to amend its constitution before assuming *any* new jurisdiction within Indian reservations, the Court would be spared the more complex task of interpreting Washington's 1963 law, and of

assessing its validity as a *partial* assumption under Public Law 280 or under the Equal Protection Clause. In light of the State's contention to the contrary (Wash. Br. 27-32), however, it becomes necessary to show that the question is before the Court.

A. The Question Is Not Foreclosed

1. The State first argues (Wash. Br. 28-29) that the Court's formulation of the issue in its Order noting probable jurisdiction forecloses the question. In our view, that is demonstrably untrue.

The Court's formulation of the issue to be addressed, rejecting the State's narrow wording (J.S. 8),[6] appears to be borrowed (with only a minor transposition) from our own statement of the "Question Presented" in the Memorandum we filed in response to the Court's invitation. See Memorandum for the United States as Amicus Curiae, p. 1. And we had there expressly suggested that the Court consider the disclaimer issue. *Id.* at 9, 13-14.[7] It is

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[6] Washington's formulation of the question presented at the jurisdictional stage encompassed only the equal protection issue (J.S. 8):

> Whether any rational basis exists for the State of Washington to have assumed jurisdiction within Indian reservations in a manner which recognizes both the fundamental interests of the state *and* the unique historical and cultural status of trust lands?

[7] We also referred (*id.* at 13) to our brief in *Oliphant* v. *Suquamish Indian Tribe*, No. 76-5729, where we had discussed this issue as involved in the present case. Brief for the United States as Amicus Curiae, pp. 54-58.

accordingly reasonable to suppose that the Court, like ourselves, viewed the statement of the question as encompassing this issue. Certainly, the Court's formulation, referring to "the statutory requirements of Public Law 280," is capable of comprising our question.

It would, moreover, be most extraordinary if the Court had intended to foreclose the disclaimer issue. It is common ground that the State's failure to amend its constitution was asserted against Washington's 1963 law in both courts below (Wash. Br. 28; Motion to Affirm, p. 5). The district court rejected the contention (A. 4-5, 11, 26, 31). Because the case was ultimately disposed of on federal constitutional grounds, the issue was not reached by the court of appeals.[8] Yet, of course, the appellees are free to defend the judgment in their favor on any federal ground urged below. See 28 U.S.C. 1254(2);[9] *Dandridge* v.

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[8] The court of appeals *en banc* did not have the question before it because of the limited purpose for which the full court convened. In passing, the majority opinion comments (erroneously, in our view) that the issue was foreclosed by this Court's Order in *Makah Indian Tribe* v. *Washington*, 397 U.S. 316 (J.S. 39). See our discussion of *Makah* below. The court of appeals, in a previous case, had rejected the argument. *Quinault Tribe of Indians* v. *Gallagher*, 368 F.2d 648, 657, certiorari denied, 387 U.S. 907.

[9] We read the cited provision as limiting the *appellant*, in attacking the judgment, to raising the question of the constitutionality of the State statute invalidated, but permitting the *appellee* to defend the judgment on any *federal* ground. That must be the case, otherwise the appellee—who has no reason to challenge by appeal or petition for certiorari a judgment which grants him all the relief sought—would be de-

Williams, 397 U.S. 471, 475 and n. 6. It follows that the disclaimer issue was unavoidably in the case when it reached this Court. And that issue remains here, unless the Order noting probable jurisdiction be taken as embodying a tacit summary ruling that the constitutional amendment challenge presents no substantial federal question. We prefer to believe that the Court does not adjudge the merits of a serious issue in such enigmatic ways. Compare *Gent* v. *Arkansas*, 384 U.S. 937-938.

2. Alternatively, the State contends that this Court, by summary orders in earlier cases, has foreclosed the disclaimer issue (Wash. Br. 29-32). The short answer is that this Court is always free to reconsider its decisions, especially so when the previous ruling was entered without plenary consideration. See, *e.g.*, *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1, 14; *Edelman* v. *Jordan*, 415 U.S. 651, 670-671; see, also, *Mandel* v. *Bradley*, 432 U.S. 173, 175-177. But, as it happens, we do not believe the Court has ever rejected the state constitutional amendment argument on the merits.

Notwithstanding the State's representation (Wash. Br. 30),[10] the question was not "squarely presented"

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prived of the benefit of the judgment rightly entered in his favor by the losing party's election to proceed by appeal rather than certiorari. The Court's Order in this case supports this view, since the statement of the question to be addressed concededly includes a non-appealable issue, *viz.* whether the partial assumption of jurisdiction is authorized by Public Law 280.

[10] As already noted (note 8, *supra*), the majority opinion of the court of appeals makes the same assumption.

to *this* Court in *Makah Indian Tribe* v. *Washington*, appeal dismissed, 397 U.S. 316. Although the Motion to Dismiss or Affirm (No. 922, O.T. 1969) noted the point (p. 7), the Jurisdictional Statement did not present the issue. Indeed, this Court treated the question as still open in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 177-178, and remanded a subsequent case for the State court to consider it. *Tonasket* v. *Washington*, 411 U.S. 451.

There remains only this Court's Orders dismissing for want of a substantial question the second appeal in *Tonasket* and the appeal in *Comenout* v. *Burdman*, 420 U.S. 915. We deal first with *Tonasket*. After the remand (411 U.S. 451), the Washington Supreme Court had reconsidered the disclaimer point and, by a divided vote, had rejected it. *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P.2d 744. The Jurisdictional Statement thereafter filed in this Court (No. 74-807) did raise the question. But it may well be that the Court deemed it "insubstantial" in the context of that case because intervening legislation (mentioned in the previous remand order, 411 U.S. 451) had rendered the practical importance of the issue *de minimis*.[11]

Like considerations may have governed this Court's disposition in *Comenout* v. *Burdman*, by an identical order entered on the same day. 420 U.S. 915. Because the order affecting the custody of the child

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[11] In our brief before the remand, we had suggested as much. See Brief for the United States as Amicus Curiae in No. 71-1031, O.T. 1972, pp. 17-19.

was only temporary and would soon expire, the case may have been viewed as likely to become moot.

3. In sum, it does not clearly appear that this Court has decided the disclaimer issue. To be sure, the Court of Appeals for the Ninth Circuit and the Washington Supreme Court have both rejected the argument. But, with the exception of *Tonasket* and *Comenout*, each of those rulings was made without the benefit of this Court's intervening decisions in *Kennerly* v. *District Court of Montana*, 400 U.S. 423, and *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, and without an opportunity to consider relevant unpublished hearings on Public Law 280. We submit the issue is worthy of this Court's plenary consideration.

B. The Question Is One of Federal Law

Of course, although the question is open and properly preserved, this Court can reach it only if it is one of federal law. See 28 U.S.C. 1254(2) and note 9, *supra*, p. 15. In our view, that is the case.

1. We begin with a principle of *federal* law: that, the *McBratney* situation aside (see note 2, *supra*), State jurisdiction over Indian country can be validly asserted only by leave of the United States. *Fisher* v. *District Court*, 424 U.S. 382, 386-388. This leads us immediately to the Act of Congress that is invoked as granting such permission, Public Law 280. It is Section 6 of that *federal* statute that must be construed. The question is whether that provision, which, in terms, assumes that in some cases it will be "necessary" to "amend * * * [the] State

constitution," and expressly precludes the effective assumption of State jurisdiction "until the people thereof have appropriately amended their State constitution or statutes as the case may be," means to leave it to the individual State to override a State constitutional provision by ordinary legislation. Whatever the answer, the issue is plainly one of federal law.

2. There is, moreover, another federal law aspect to the issue. The disclaimer in the Constitution of Washington is not there by local choice. As we shall see, it was a condition of the State's admission to the Union, and the terms of the disclaimer are dictated by the Enabling Act passed by Congress. In effect, the operative words of the Washington Constitution were framed by the national legislature for a federal purpose and in construing them we must look to the intent of Congress. Cf. *Delaware River Comm'n* v. *Colburn*, 310 U.S. 419, 427-428; *Petty* v. *Tennessee-Missouri Comm'n*, 359 U.S. 275, 278.

What is more, in the case of Washington, Congress not only required disavowal of jurisdiction over Indian country, but insisted, as a condition of admission, that the disclaimer be made part of the State *constitution*. Presumably, that was to better assure its permanent survival. In those circumstances, it may be doubted whether it is entirely a State law question by what means the constitutional disclaimer may be overridden. See *Dyer* v. *Sims*, 341 U.S. 22, 28-32; *Petty* v. *Tennessee-Missouri Comm'n*, *supra*, 359 U.S. at 278-280.

3. Finally, there lurks in the background a federal constitutional question. The consequence of Washington's 1963 law, if valid, is to withdraw from the reservation Indians within the State the protection of federal law in most situations and the right to be governed by their own laws in others. These are matters of fundamental importance to the Tribes. Even if they may be subjected to laws they have not chosen, the Indians may yet be entitled to insist that the State's assumption of jurisdiction over them be in accordance with usual "due process." It is, therefore, a question of federal constitutional relevance whether the State of Washington has sought to single out the Indians' case for special treatment by purporting to fashion a unique rule for abrogating a State constitutional provision. Cf. *Hunter* v. *Erickson*, 393 U.S. 385, 389-393; *Reitman* v. *Mulkey*, 387 U.S. 369, 376-377. See, also, *Gomillion* v. *Lightfoot*, 364 U.S. 339.

C. The Merits of the Question

Whatever else is debatable, there can be no disagreement that Public Law 280 deals with the so-called "disclaimer" States separately. That is the whole point of Section 6 (*infra*, pp. 10a-11a). Assuming, as we do, that Washington is such a State, we accordingly focus on that provision.

But the text of Section 6 does not immediately resolve the disclaimer issue. It is convenient to proceed by asking ourselves, in sequence, the following questions: (1) What was the congressional understanding in 1953 of the disclaimer State situation?;

(2) To what extent were these assumptions the basis of congressional action; and, finally (and perhaps in part unnecessarily) (3) Were the premises underlying Section 6 in fact correct?

1. *The Congressional understanding in 1953*

The mind of Congress is not always clearly revealed. But, in this instance, we are fortunate in having the transcript, albeit unpublished, of the critical committee hearings, which has once again [12] been submitted to the Court.[13] From that transcript, and other materials, we now know with reasonable certainty how Section 6 came to find its place in Public Law 280.

a. The genesis of Section 6 begins in the hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs. On June 29, 1953, that subcommittee was considering one of several bills that eventually led to Public Law

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[12] The unpublished transcript of hearings on Public Law 280 now submitted by the appellee has twice before been before the Court, in *Tonasket* v. *Washington*, 411 U.S. 451, and *Bryan* v. *Itasca County*, 426 U.S. 373. See 426 U.S. at 383 n. 9.

[13] The transcript covers two hearings: (1) Hearing on H.R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (June 29, 1953), and (2) Hearing on H.R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (July 15, 1953). They are both printed as Appendix I to the Appellee's Brief. We refer to both hearings hereinafter as "1953 Hearings," citing to the pages of the Appellee's Appendix I (the numbers at the bottom of the page).

280. The bill in question reached only the State of California—not a "disclaimer" State (1953 Hearings at 2). The Chief Counsel of the Bureau of Indian Affairs presented a substitute to the original bill, noting that both the State and the Tribes in California had indicated a wish to have state jurisdiction asserted (*id.* at 3). Although suggesting that the substitute recommended might serve as a prototype for other States, he cautioned that the Department of the Interior would urge exclusion of certain reservations where the Tribes preferred to retain their own laws (*id.* at 4, 10). He later explained that, at least tentatively, the Department would recommend exemption of the Colville and Fort Yakima Reservations in Washington (*id.* at 13).

It became clear, however, that the Members wished to consider a general bill, covering all or most States, and the Interior representative was asked to draft such a measure (*id.* at 5-19). It was then pointed out by Counsel to the Committee that "several * * * states have constitutional prohibitions against jurisdiction" (*id.* at 17). This provoked the following colloquy between the Chief of the Branch of Law and Order of the Bureau of Indian Affairs (William R. Benge) and Congressman Aspinall (*id.* at 17):

> Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would have to amend the constitution.*
>
> I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> Mr. Benge: *Yes, sir.* [Emphasis added.][14]

The Department of the Interior's substitute bill was then reported to the full Committee, on the understanding that it would encompass all Indian country which the Department would recommend for inclusion (*id.* at 18-20). The Department of the Interior duly responded. There were probably other communications, but the substance of the Department's position appears in a letter dated July 7 from Assistant Secretary Lewis, annexed to the House Committee report. H.R. Rep. No. 848, 83d Cong., 1st Sess. 7-8 (1953). That letter recites that the Bureau of Indian Affairs had consulted with State and local authorities and Indian groups in the five "mandatory" States and also Nevada and Washington. *Id.* at 7. He noted that certain Tribes in the "mandatory" States objected to State jurisdiction, and they were in fact exempted. But it was also stated that

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[14] Unless otherwise noted, the emphasis in all subsequent quotations has been added.

the Colville and Yakima Tribes in Washington likewise opposed the transfer to State jurisdiction and that they, too, had "a tribal law-and-order organization that functions in a reasonably satisfactory manner." *Id.* at 7-8.

The Assistant Secretary then listed the eight "disclaimer" States, including Washington, noting that "[i]n each instance the State constitution contains an appropriate disclaimer."[15] And he concluded that "[i]t would appear in each case, therefore, that the Congress would be required to give its consent and the *people* of each State would be required to * * * amend the State constitution before the State legally could assume jurisdiction." *Id.* at 8.

This information was evidently before the full House Committee on Interior and Insular Affairs

[15] Here, and throughout the debates on Public Law 280, the disclaimer States were said to be Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and Washington. These are, in fact, the only States with a disclaimer of jurisdiction over Indian lands in their State constitution which directly results from a provision in the Enabling Act for the admission of the State. We should note, however, that two other States, Idaho (Art. 21, § 19) and Wyoming (Art. 21, § 26), have identical provisions in their State constitutions and that those constitutions were submitted to Congress before the State was admitted (26 Stat. 215, 222). See *Village of Kake* v. *Egan*, 369 U.S. 60, 68. A strong argument can be made that Idaho and Wyoming are likewise covered by Section 6 of Public Law 280. On the other hand, their situation is different in that their disclaimer provisions were not directly framed by Congress. Without expressing any concluded view on the matter, we here follow the congressional pattern and exclude Idaho and Wyoming from the category of disclaimer States.

when it met on July 15. The Counsel to the Committee reported that, according to the Bureau of Indian Affairs, there were eight States, including Washington, which had "organic law impediments in their constitutions or other laws" preventing assertion of jurisdiction over Indian country (1953 Hearings at 23) and he submitted an amendment that would reach those "disclaimer" States. As he explained to the Members, "[the] proposed amendment * * * would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments *by the people* in the state, they could then take over the exclusive civil and criminal jurisdiction over Indians and Indian matters" (*ibid.*). Then as now, this was Section 6 (see *id.* at 25). A further new provision, Section 7 (see *id.* at 29), was proposed to permit "any other Indian states, some 15 or 18," where there was no such "legal impediment," "at such time as the *legislative body* affirmatively indicated their desire to so assume jurisdiction" (*id.* at 24).

When the new Section 6 was read, the Acting Chairman of the Committee, obviously noting that the proposal referred to both "state constitutions" and "existing *statutes*," commented (*id.* at 25): "I do not think we have to grant permission to a state to amend its own statutes." Counsel responded (*id.* at 26): "I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the [Enabling] Act and it may be unnecessary, but by

some state courts it may be interpreted as being necessary." Congressman Westland of Washington then expressly referred to the situation in his State (*id.* at 26):

> I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment in order that they can get at it.

A few moments later, another Member, pointing out that the state constitutional impediments were dictated by the congressional Enabling Acts (*id.* at 27-28), suggested that express reference should be made in Section 6 to the repeal of the Enabling Act obstacle. This provoked the comment that "Congress does not have to give consent to a state to amend its constitution or its laws" (*id.* at 27). But the rejoinder was made that the "disclaimer" States "have no right to change [their] constitution or even [their] statutes without consent of the Government" because those provisions were "in the constitution as a direct result of being in the Enabling Act" (*id.* at 28). Finally, the Acting Chairman questioned whether it was necessary to include the proviso in Section 6—which forbids the assertion of jurisdiction by a "disclaimer" State "until the people thereof have appropriately amended their state constitutions or statutes, as the case may be" (*id.* at 29). A Member responded affirmatively, and Section 6 was adopted (*id.* at 29).

The next day, July 16, the Committee filed its report. H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953). Except for an additional provision (Section 8) dealing with the application of the Indian liquor laws, later deleted (99 Cong. Rec. 10784 (1953)), the text of the bill as reported is identical with Public Law 280 as enacted. H.R. Rep. No. 848, *supra*, at 1-3. The report explains that the bill deals separately with (1) the five "automatic" or "mandatory" coverage States; (2) the eight "disclaimer" States, and, finally, (3) "all other States." *Id.* at 6-7. The explanation of the operation of the bill as it affects "disclaimer" States is as follows (*id.* at 6-7):

> [G]ive consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as

reported, proceed to amendment of their respective organic laws *by proper amending procedure.* [Emphasis added.]

The House passed the bill without debate on July 27 (99 Cong. Rec. 9962-9963 (1953)). In the Senate it was referred to the Committee on Interior and Insular Affairs (99 Cong. Rec. 10065 (1953)). That Committee apparently held no hearings, and, two days later, reported out the bill without amendment, adopting the House report *in haec verba.* S. Rep. No. 699, 83d Cong., 1st Sess. (1953); 99 Cong. Rec. 10217 (1953). The bill received very brief consideration on the Senate floor before it was passed on August 1. 99 Cong. Rec. 10782-10784 (1953). But it is worth noting that Senator Case, in presenting it, and Senator Barrett in supporting him, both adverted to the necessity for some States to "amend their constitutions" or to "remove their constitutional limitations" before asserting jurisdiction over Indian country. 99 Cong. Rec. 10782 (1953). Senator Case expressly mentioned Washington as one of these disclaimer States. *Ibid.* The President signed the bill into law on August 15 (99 Cong. Rec. 11161 (1953)), expressing "grave doubts" about the failure to require tribal consent and recommending an amendment to cure that defect. See *Public Papers of the President*, 1953, para. 166, p. 564, reprinted at 102 Cong. Rec. 399 (1956).

b. At a minimum, what emerges from the legislative history is that the 89th Congress believed the State of Washington, like seven other States, would

not be free to assume the new criminal and civil jurisdiction over Indian country tendered by Public Law 280 until it had amended its constitution by the normal popular referendum procedure. This conclusion was based on two subsidiary premises: (1) that the Enabling Act for the admission of Washington and the corresponding provision in the State constitution barred Washington from asserting the jurisdiction in question, and (2) that, because, in the case of Washington at least, the State "legal impediment" was embedded in the constitution, it could not be removed by ordinary legislation.

In *Tonasket* v. *State, supra,* a majority of the Washington Supreme Court concluded that both congressional assumptions were false. We believe the State court was in error. One does not lightly challenge the congressional understanding, especially when it involves construction of earlier federal legislation and is supported by those in the Executive Branch who are presumptively knowledgeable on the subject, as well, apparently, as State authorities.[18] See *Mattz* v. *Arnett*, 412 U.S. 481, 505 and n. 25. But, if it can be shown that the 83d Congress was in error, the question arises whether the legislative misunderstanding is nevertheless binding on the State.

In our view, the answer depends upon how, if at all, erroneous assumptions (conceding the point, *arguendo*) affected congressional action. We submit

[18] See the statement of Congressman Westland of Washington quoted *supra,* p. 26.

the premises underlying Section 6 of Public Law 280 *did* affect the result. Let us see.

2. *Congressional assumptions and legislative action*

a. The bald fact is that if the 83d Congress had shared the views of the Washington Supreme Court, Section 6 would never have been written. Section 7 (*infra*, p. 11a), requiring only "affirmative legislative action," would have served for all optional States. That is so because, as we shall see (*infra*, p. 40), Washington is in no different posture than the other disclaimer States. If Washington's Enabling Act and State constitutional disclaimer is no impediment to the assertion of jurisdiction, or if the obstacle can be overridden by ordinary prospective legislation, then the same is true for the seven other disclaimer States, and Section 6 has no life whatever.

What is more, it is probable that, but for the supposed state constitutional obstacle, Washington would have been included among the "mandatory States," excluding however the Colville and Yakima Reservations. We base that assumption on the fact that, as we have seen, in Washington—unlike the situation of the other option States except Nevada [17]—both the State authorities and the Tribes had been consulted (H.R. Rep. No. 848, *supra*, at 7-8; 1953 Hearings at 26), the State indicating its "readiness to take over

[17] The reason for not including Nevada as a "mandatory" State was quite different: it was reluctant to assume the additional financial burden involved in the absence of a federal subsidy. See pp. 71-72, *infra*.

on this jurisdiction" (*id.* at 26), the Colville and Yakima Tribes objecting and being, at least tentatively, recommended for exemption by the Department of the Interior (H.R. Rep. No. 848, *supra*, at 7-8; 1953 Hearings at 13). In those circumstances, it is fair to presume that, absent the special impediment of a constitutional bar, Congress would have resolved the matter for Washington as it did for Minnesota, Oregon and Wisconsin. See Public Law 280, Sections 2 and 4, *infra*, pp. 7a-9a.

Thus, at least the Colville and Yakima Tribes most likely would have been granted congressional *protection* from any unilateral State attempt to assert jurisdiction over them if the Washington Enabling Act and State Constitution had been deemed no obstacle.[18]

[18] We read Section 7 of Public Law 280 (before its amendment in 1968) as applicable only to States "other" than the "mandatory" States. Accordingly, the Reservations exempted by Sections 2 and 4 could be subjected to State jurisdiction only by subsequent *congressional* action. In fact, Congress has removed the exemption of only one Tribe, the Menominees of Wisconsin (68 Stat. 795), and that was done at the Indians' request. See *Menominee Tribe* v. *United States*, 391 U.S. 404, 410 n. 11. Subsequently, however, Congress repealed the "termination" Act affecting the Tribe (Menominee Restoration Act, 87 Stat. 770, 25 U.S.C. (Supp. V) 903-903f), and the State of Wisconsin has retroceded the jurisdiction previously assumed over the Menominee Reservation. See American Indian Policy Review Commission, *Final Report*, vol. 1, p. 202 (1977). The Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon remain exempt from State jurisdiction. 18 U.S.C. 1162(a); 28 U.S.C. 1360(a).

This is not to suggest that, as a matter of constitutional power, Congress could not have overridden the "impediment" of Article XXVI of the Washington Constitution. Indeed, it did just that in the case of Alaska. See Act of August 8, 1958, 72 Stat. 545. But, whatever the reason, the framers of Public Law 280 chose not to fully exert congressional authority. What considerations led to this decision, it is not easy to say. It may be that the 83d Congress, despite its "assimilative" viewpoint, thought it important to assure the full-fledged consent of the State's citizenry before this important step was taken, carrying with it substantial new responsibilities, among them a heavy additional financial burden. Popular approval may have been deemed especially appropriate in the "disclaimer" States on the assumption that the disclaimer provisions evidenced an unusual degree of white-Indian hostility.[19] It is not inconceiv-

[19] If cases reaching this Court this century in which the State or its non-Indian citizens were held to have wrongly attempted to assert jurisdiction over Indians or trespassed on Tribal rights are any guide, such an assumption might seem justified at least for the disclaimer States of Arizona, South Dakota, Montana and Washington. For the State of Washington, see, *e.g.*, *United States* v. *Winans*, 198 U.S. 371; *Seufert Bros.* v. *United States*, 249 U.S. 194; *Tulee* v. *Washington*, 315 U.S. 681; *Seymour* v. *Superintendent*, 368 U.S. 351; *Puyallup Tribe* v. *Washington Game Dept.*, 391 U.S. 392; *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44; *Antoine* v. *Washington*, 420 U.S. 194. See, also, *United States* v. *Pelican*, 232 U.S. 442; *Satiacum* v. *Washington*, 414 U.S. 1. And the friction continues. As recently as April of this year, continued interference with tribal fishing rights in Washington provoked the Court of Appeals for the Ninth

able that some who voted for Public Law 280 saw in the requirements of Section 6 a measure of protection for the Tribes against over-zealous legislatures.[20] Others no doubt simply deemed it "fitting and proper" that what had been settled by the people of the State as a whole should be undone only by them.

b. We cannot know with assurance what informed the legislative mind. On the other hand, we ought not blithely assume that Congress was indifferent to the method by which the disclaimer States would assume jurisdiction over unwilling Tribes.[21] But, motives

Circuit to comment that the State had engaged in "extraordinary machinations in resisting [the federal court's] decree" in *United States* v. *Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676, certiorari denied, 423 U.S. 1086, and that "[e]xcept for some desegregation cases * * *, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed this century." *Puget Sound Gillnetters Association, et al.* v. *United States District Court for the Western District of Washington, et al.*, Nos. 77-3129, 77-3208, 77-3209, 77-3654, 77-3655, C.A. 9, decided April 24, 1978, slip op. 2-3.

[20] In the only three instances of which we have knowledge, proposals for asserting State jurisdiction over Indian country sponsored by the legislature were, it is said, overwhelmingly defeated by the electorate when the matter was submitted to them. This is reported to have occurred in South Dakota in 1963 and 1966, and in Wyoming in 1964. See Petition for Certiorari in *Quinault Tribe* v. *Gallagher*, No. 1040, O.T. 1966, p. 11 n. 23. We are not informed that popular opinion has ever been tested in Washington.

[21] In the case of the Indians of the Yakima Nation, it is clear enough that they have at all times resisted State jurisdiction. As we have seen, their objection was reported to the

aside, it is clear that the framers of Public Law 280 translated their understanding (correct or not) into the text of Section 6.

That provision, it will be remembered, first grants consent to "the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction" over Indian country. And Section 6 then goes on explicitly to withhold any such jurisdiction "until the people" of the State "have appropriately amended their State constitution or statutes as the case may be." On its face, the text is in some respects ambiguous. But, in light of what we now know, the meaning is tolerably clear.

Section 6 twice refers to "the people," not by accident, but by design. We need only recall Congressman Aspinall's correction of the Interior Department representative's slip at the first subcommittee hearing. The latter had alluded to the "State legislature" amending the State constitutional disclaimer and Mr. Aspinall pointed out that "[t]he State legislature could not do it. The people of the State themselves would have to do it" (*supra*, p. 23). Obviously, that colloquy was borne in mind when the Department returned with a new draft bill. Indeed, the Assistant Secretary's letter, eight days later, recites that "the people of each State would be required to amend the

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Congress in 1953. Moreover, unlike other Tribes, they did not petition for coverage under Washington's elective 1957 law.

State constitution" (*supra*, p. 24), and, at the full Committee meeting a week afterwards, Committee Counsel was careful to explain that disclaimer States could assume jurisdiction "[a]t such time as they remove these impediments by the people in the State" (*supra*, p. 25). And, finally, the House Committee Report, issued the next day, carries the point forward by referring to the disclaimer States as now free to amend their constitution "by proper amending procedure" (*supra*, p. 28).

We are thus left in no doubt that, in Section 6, "the people" means what it says. To be sure, some confusion is created by using the same words in Section 7, where, presumably, the legislature alone is authorized to "obligate and bind the State."[22] This may be a mere slip of the pen, unthinkingly reproducing the formula of Section 6. Or, as "in such manner" suggests, the draughtsman of Section 7 may have been advertently using an all-inclusive expression to cover the case of a State that deemed it right to consult the whole of "the people" before irrevocably binding the State to assuming a burdensome new responsibility. But, however that may be, the legislative history of Section 6 is unambiguous: *there*, "the people" connotes the whole electorate.

Returning to the text of Section 6, we note the reference to "existing statutes." Here, again, we must turn to the legislative history for an explanation.

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[22] Committee Counsel was seemingly clear that the State's "legislative body" could speak for the State under Section 7. See *supra*, p. 25.

Although most speakers referred only to constitutional disclaimers, it was suggested that, in some States, there were like provisions also, or only, in statutory form. See *supra*, pp. 25-26. So far as we are aware, no State in fact had a merely statutory disclaimer.[23] But the draughtsmen of Section 6 apparently assumed otherwise. Whether, in that purely hypothetical case, Section 6 would require a popular referendum to repeal the statutory impediment, we need not decide.[24] It is, however, perfectly clear that the Section contemplates the removal of *constitutional* obstacles by the people themselves.

In our view, the interposition of the words "where necessary" does not affect the question. In light of the legislative history, that phrase—like "as the case may be"—merely covers the assumed (but factually nonexistent) case of a State with only a statutory disclaimer. Those concerned in the framing of Section 6 too often repeated that where there was a

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[23] There were, however, at least some States with statutes paralleling a constitutional disclaimer. See, *e.g.*, North Dakota Century Code § 57-02-08(4) (1972 Repl.); Oklahoma Statutes Annotated, tit. 68, § 2405(a) (1966).

[24] The colloquy between the Acting Chairman of the House Committee and Committee Counsel (*supra*, pp. 25-26) does not fully resolve the question. We understand Counsel to be suggesting that "some state courts" might require a popular referendum for repeal of even statutory disclaimers. But it does not follow that Section 6 leaves the matter there. On the contrary, it is arguable that, because some courts would require it anyway, the draughtsman decided to make a uniform rule, requiring popular acquiescence in all cases.

constitutional disclaimer, amendment *was* necessary, to authorize us to read those words as leaving it entirely up to the States whether they would simply disregard the impediment. And, of course, we know that, in the particular case of Washington, the responsible Committee expressly understood that "they do have a constitution there that requires this amendment in order that they can [assume jurisdiction]" (*supra*, p. 26).

c. We have seen what Section 6 "contemplates" as to the procedure by which constitutional disclaimers would be removed. But the provision does not stop there: it goes on affirmatively to *require* that this procedure be followed before any disclaimer State can assert jurisdiction. As we have seen (*supra*, p. 26), the inclusion of the proviso was questioned, but it was retained. The mandate is unequivocal: "the people" of the State must "appropriately amend[] their State constitution"—if the impediment is lodged there—or "the provisions of [the] Act shall not become effective." This is a strict requirement which cannot be avoided. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. As this Court said in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 178, in Section 6, "Congress * * * required * * * the amendment of those state constitutions which prohibit the assumption of jurisdiction * * * [and] the same goal [cannot be accomplished] unilaterally by simple legislative enactment." See, also, Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L.

Rev. 535, 568-575 (1975); Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 566 n. 339 (1976).

Yet, that is precisely what Washington has sought to do. Indeed, the State has not even purported *legislatively* to repeal or amend Article XXVI of its constitution. It has proceeded directly to take "affirmative legislative action" under Section 7 of Public Law 280, entirely by-passing Section 6. As a disclaimer State, Washington had no such option and its legislation [25] must accordingly be held of no effect.

How does Washington seek to escape this seemingly unavoidable conclusion? First, as we have seen, the State Supreme Court in *Tonasket* was persuaded to hold that Washington was not really a disclaimer State. This is more than a little surprising in light of the unanimous opinion in 1953, shared by Washington's own Representative on the relevant congressional Committee and apparently also by State officials (see *supra*, p. 26), that the State Constitution contained an impediment to asserting jurisdiction. But, it is true, the disclaimer States are not listed in Section 6 of Public Law 280 and it may be that the congressional assumption about Washington is not binding on this point. It is therefore appropriate to determine whether or not the State of Washington

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[25] Although the 1957 statute is not involved here because the Yakima Nation never consented to State jurisdiction under that law, we believe it stands on no better footing under Section 6 than does the 1963 statute directly at issue.

was in fact—as everyone said at the time—a disclaimer State.

3. *The correctness of the congressional understanding that the Washington Constitution contains an impediment to the State's assertion of jurisdiction over Indian country*

We submit that the Washington Supreme Court was plainly wrong in ruling that Article XXVI of the State constitution is no bar to asserting Public Law 280 jurisdiction.

a. It is, of course, conceded that Article XXVI is a mere transposition into the State constitution of a provision of the Enabling Act, which *required* its inclusion in the State's organic law. See *Tonasket* v. *State*, *supra*, 84 Wash.2d at 173, 525 P.2d at 752-753; *State* v. *Paul*, 53 Wash.2d 789, 791, 337 P.2d 33, 35; *Quinault Tribe of Indians* v. *Gallagher*, *supra*, 368 F.2d at 656-657. And it follows, as we have said, that the reach of Article XXVI is a question of federal law, to be determined by looking to the intent of Congress when it passed the Enabling Act of 1889.

The Act of February 22, 1889, 25 Stat. 676, provided for the admission of four new States, North Dakota, South Dakota, Montana and Washington. Section 1, 25 Stat. 676. But there were conditions. One such condition, common to all four States (Section 4, 25 Stat. 676-677, *infra*, pp. 1a-3a), was that the constitutional convention in each must "provide, by ordinances irrevocable without the consent of the United States and the people of said States":

> * * * That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * *

So far as is relevant to our question, identical language is to be found in the Enabling Acts covering Utah (28 Stat. 107, 108), Oklahoma (34 Stat. 267, 270), New Mexico (36 Stat. 557, 558-559) and Arizona (36 Stat. 569). This ought to give us pause. If the Washington Enabling Act and State constitution contain no impediment to the assertion of full criminal and civil jurisdiction over Indian country, then it follows that there were *no* disabled States. In that event, both the Executive and Legislative Branches of the national government must be charged with having written Section 6 into Public Law 280 to no purpose. But let us return to the language of the Enabling Act.

b. On its face, the provision plainly requires the new States to disclaim *both* any property interest over "Indian lands" *and* any jurisdiction to impose their own laws there.[26] To be sure, in *Draper* v.

[26] We assume the territorial scope of the disclaimer provisions reaches all "Indian country" as defined in 18 U.S.C. 1151. See *Seymour* v. *Superintendent*, 368 U.S. 351; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478-479. But that question need not be resolved here since the 1963 Washington statute clearly purports to reach Indians on their trust lands with respect to some matters.

United States, 164 U.S. 240, the present Enabling Act was held not to bar the State of Montana from trying a non-Indian for the murder of another non-Indian within a reservation, and in *Village of Kake* v. *Egan*, 369 U.S. 60, the Alaska Enabling Act (which included comparable language but had a limiting legislative history) was construed as permitting the State to apply general fishing regulations to the off-reservation activities of Indians.[27] But those cases have been explained as carving out special exceptions. See *Donnelly* v. *United States*, 228 U.S. 243, 271-272; *Williams* v. *United States*, 327 U.S. 711, 714; *Williams* v. *Lee*, 358 U.S. 217, 219-220; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 171-172, 176 n. 15. This Court has never held that these disclaimer provisions do not mean what they appear to say in precluding the attempted assertion of State jurisdiction to arbitrate disputes involving

[27] It is not clear why the Court discussed the Enabling Act disclaimer at all in this case since the Alaskan natives had, in any event, been subjected to State jurisdiction under the "mandatory" provision of Public Law 280. See Goldberg, *supra*, 22 UCLA L. Rev. at 571. Presumably, the Court was answering the argument that the Enabling Act was a "federal statute" immunizing Indian "property" from State regulation, which was accordingly exempted from State jurisdiction under Public Law 280. See 18 U.S.C. 1162(b), 28 U.S.C. 1360(b).

Indians within a reservation or other defined Indian community.

The Court, it is true, has had little occasion to construe the Enabling Act disclaimers. That is because the general rule, with only limited exceptions, has always been that, unless Congress has so provided, State authority does not reach "Indian country" even in the absence of an express disclaimer. *E.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 and n. 2. Yet, we are not lacking indications as to this Court's view of the import of such a disclaimer. For a century, whenever those provisions have been noticed, the Court has treated them as reserving to the United States at least the kind of jurisdiction embraced by Public Law 280. See *Ex parte Crow Dog*, 109 U.S. 556, 561 (dictum); *United States* v. *Sutton*, 215 U.S. 291, 295 (Washington, Yakima Reservation); *United States* v. *Sandoval*, 231 U.S. 28 (New Mexico, Santa Clara Pueblo); *United States* v. *Chavez*, 290 U.S. 357, 360 (New Mexico, Pueblo of Isleta); *Williams* v. *United States*, 327 U.S. 711, 714-715 n. 10 (Arizona, Colorado River Reservation); *Williams* v. *Lee*, 358 U.S. 217, 222-223 and n. 10 (Arizona, Navaho Reservation); *Seymour* v. *Superintendent*, 368 U.S. 351, 356-357 n. 13 (Washington, Colville Reservation); *Warren Trading Post* v. *Tax Comm'n*, 380 U.S. 685, 687 n. 3 (Arizona, Navajo Reservation); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (New Mexico, off-reservation Indian enterprise); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 175, 178 (Arizona, Navajo Reservation); *Fisher* v. *District Court*, 424 U.S. 382, 386 and n. 8 (Montana, Northern Cheyenne Reservation).

c. If further evidence is needed, we find it in the legislative history of the first of the disclaimer Enabling Acts, which formed the pattern for those that followed. As it happens, this is the Act authorizing the admission of Washington and three other States.

We need not rehearse the long and embattled history of this legislation. We may begin with the adoption of a constitution by the inhabitants of the southern portion of the Dakota Territory in 1885. In what concerns us, it provided (in Article XXII) only that the people of the prospective State disclaimed "all *right* and *title* to the unappropriated *public lands* of the United States lying within the State, and that the same shall be and remain at the sole and entire *disposition* of the United States" (emphasis added). See S. Rep. No. 15, 49th Cong., 1st Sess. 61 (1886). There is here no mention of Indian lands, nor any disclaimer of "control" or "jurisdiction" over them. Yet, at first, the Senate Committee on the Territories was satisfied that this comported with "the usual stipulations in the nature of a compact with the United States"—as indeed it did—and in two succeeding sessions the Committee reported bills that would have admitted South Dakota on this basis, without requiring any further disclaimer. S. Rep. No. 15, *supra*, at 3; S. Rep. No. 75, 50th Cong., 1st Sess. 6-10, 11, 65-66 (1888).

The House, however, balked. To be sure, the main point of disagreement was over the division of the Dakota Territory into two States. See the adverse reports of the House Committee on the Territories, in May 1886 and February 1888, annexed to H. R. Rep. No. 1025, 50th Cong., 1st Sess. 19-25 (1888). But when, at length, the House Committee favorably reported a measure (which would have authorized the admission of the Dakota Territory as a whole, as well as Montana, Washington and New Mexico), it took the occasion to specify in the proposed Enabling Act that each State would be required to adopt, at new constitutional conventions, irrevocable disclaimers in the very language now found in the constitutions of North and South Dakota, Montana and Washington. See 19 Cong. Rec. 2021 (1888); 20 Cong. Rec. 807 (1889). This was highlighted in the Report (H.R. Rep. No. 1025, *supra*, at 8-9): "Your committee desire to call attention to the fact that there are in the Dakota Territory large Indian reservations, which by the terms of the bill are *excluded* from the jurisdiction of the proposed State * * * and remain within the *exclusive* control and jurisdiction of the United States." See, also, *id.* at 2.

A month later, the Senate Committee, while still insisting (and ultimately prevailing) on the division of Dakota, adopted the disclaimer language of the House bill. 19 Cong. Rec. 2832 (1888). There was, it is true, very little notice taken of the new disclaimer in the floor debates. But there is one speech worth recording. The Dakota Delegate did not miss

the thrust of the disclaimer (20 Cong. Rec. 812-813 (1889)):

> There is another question here to which the gentleman has referred which requires special mention, and that is found in subdivision 2, of section 4, in reference to Indian lands and Indian property.
>
> * * * * *
>
> But I want to call attention now to the peculiar provisions of this subdivision of this section. I can not imagine where the gentleman from Illinois found them or what he drew them from. They are most extraordinary. Why, sir, under this subdivision if a man who has a single drop of Indian blood in his veins holds a section of land we can not even lay out a highway over it. We can not exercise any right of eminent domain over the land, no matter whether he has held it one year, or twenty-five years, or fifty years; and every man is held to be an Indian who has Indian blood in his veins, and there are many such in Dakota.
>
> * * * * *
>
> We are to recognize tribal relations in connection with Indians for only a very short time longer. Our proposed State can not submit or consent to any such provisions as these.

The Dakota Delegate recognized that the disclaimer required of his State—and of the other States covered by the bill, including Washington—went far beyond anything previously demanded as a condition of admission. But he was not contradicted, nor comforted by any suggestion that his fears were unfounded.

And, when the bill was eventually passed, the disclaimer provision remained unaltered—expressly disabling the new States from enforcing their laws in Indian country.

We may lay the matter to rest. Whatever the exact reach of the Enabling Act disclaimers, the Congress of 1953 correctly viewed them and the consequential State constitutional provisions as "legal impediments" to the assertion of jurisdiction under Public Law 280.

This conclusion, of course, undermines one of the Washington Supreme Court's grounds of decision.[28] But there was a second basis for the resolution of the disclaimer issue: that the constitutional disclaimer, if an obstacle, was effectively removed by the enactment of the 1963 statute. What of that alternative ground?

4. *The correctness of the congressional understanding that disclaimer States with a constitutional impediment would be required to remove it by amendment submitted to the whole people.*

We have already indicated why we believe Section 6 of Public Law 280 moots this question. In our view, the 83d Congress effectively determined that all the disclaimer States, including Washington, must

[28] The holding that Article XXVI of the Washington Constitution is no bar to the assertion of Public Law 280 jurisdiction was new in *Tonasket*. Both of the earlier State court decisions on the disclaimer issue assumed the contrary. *State* v. *Paul, supra; Makah Indian Tribe* v. *State*, 76 Wash.2d 485, 457 P.2d 590. So, also, the Court of Appeals for the Ninth Circuit in *Quinault Tribe* v. *Gallagher, supra,* assumed Article XXVI *was* an impediment that must be removed.

amend their constitution in the traditional way before assuming jurisdiction over Indian country. If that is true, it cannot matter whether the congressional premise was correct or not. Nevertheless, out of abundance of caution, we address the point.

a. At first blush, one is tempted to defer to the State Supreme Court on this point, reasoning that the process by which Washington amends its own constitution is a purely local matter. This inclination is increased as one confronts the difficulty of explaining how it is that Article XXVI, alone among the provisions of the State Constitution, can be overridden by an ordinary act of the legislature, passed by a simple majority, notwithstanding the amending Article which makes no such exception to the normal requirement of a popular referendum. Wash. Const., Art. XXIII (*infra*, pp. 5a-6a).[29] The temptation to avoid the question becomes almost irresistible as one appreciates the problem of sustaining the proposition that a constitutional provision entrenched as expressly "irrevocable" until the consent of both the United States "and the people of the State" has been obtained, is somehow less of a restraint on the State legislature than any merely declarative article

[29] The cited provision of the 1889 Constitution permits amendment by referendum or convention only after both houses of the State legislature have approved the proposed amendment, or the calling of a constitutional convention, by a two-thirds majority. In either case, the amendment must be submitted to popular approval. These requirements were in no way diluted by Amendment 37 to the Constitution, adopted by popular referendum in 1962.

of the organic law. See *State* v. *Paul, supra*, 53 Wash. 2d at 793-794, 337 P.2d at 36-37.[30] And, finally, there is strong reason to wish to be excused from resolving the problem whether the disclaimer clause of Article XXVI was effectively "repealed" in 1957 (as the Washington Supreme Court held in the *Paul* case) or in 1963 (as the federal court of appeals seems to have held in *Quinault*), and why, in either case, the provision is still retained intact in more recent compilations of the Washington laws, without any notation that it has been effectively repealed or amended. See, *e.g.*, 2 R.C.W.A. Const. (1966), pp. 304-306.

But we cannot avoid the issue by simply deferring to the State court. The reason, as before, is that Article XXVI of the Washington Constitution is not merely a stipulation of local law: the provision was framed in the federal Congress, included in the Enabling Act, and is part of a compact between the State and the United States. As we have already said, the consequence is that the true construction of Article XXVI is a question of federal law. And that includes the meaning of the words "irrevocable without the consent of the United States and the people of this state," which are in the Enabling Act. See *supra*, p. 39.[31]

[30] In *Makah* and *Tonasket* the Washington Supreme Court merely relied, as to this point, on the reasoning of *Paul*. See 76 Wash.2d at 490, 457 P.2d at 593; 84 Wash.2d at 178, 525 P.2d at 753. *Paul* itself relied on the earlier decision in *Boeing Aircraft Co.* v. *Reconstruction Fin. Corp.*, 25 Wash.2d 652, 171 P.2d 838, involving a different provision of Article XXVI. But, as the dissenting opinion in *Tonasket* points out, that is a doubtful precedent since the repeal of the portion of Article XXVI there involved was in fact ratified by popular referendum a few months after the decision. See 84 Wash.2d at 189, 525 P.2d at 759-760.

b. The question is: what did the Congress of 1889 intend by "the consent of * * * the people of the State"? On the face of the provision, the answer seems obvious. In normal usage, "the people" does not mean the legislature. The distinction is as old as the federal Constitution. Compare Article I, Section 2, with Article I, Section 3. And see Amend. X. Nor had it been abandoned in 1889. Indeed, the Article of the Washington Constitution of that year governing amendments speaks of the qualified electors as "the people" (Art. XXIII, secs. 1 and 3) as contrasted with the "legislature" (Art. XXIII, secs. 1-2).

Moreover, we must attempt to give some meaning to the requirement that "the people of the State" consent. Yet, that clause serves no purpose at all if the State legislature is free to assume jurisdiction over Indian lands as soon as federal consent is given. Were that the intent, it would have been enough to say that the disclaimer would be "irrevocable without the consent of the United States," without mentioning "the people of the State." It may be argued that, for the sake of appearances, the language of a bilateral contract was preferred. But, in that event,

[31] Because the Enabling Act applies to four States, the formula there is "* * * and the people of said States." Obviously, however, what is intended is "the people" of each State.

why not "without the consent of the United States and the State"? The "people" of the United States are not spoken of: why should the "people" of the State be mentioned, destroying the symmetry of the clause?

We can but assume the reason for expressly referring to "the people" was the same as that which underlay congressional insistence that the provision be adopted, in the first place, by the popularly elected constitutional conventions, then be ratified by a majority of the citizenry, and that the disclaimer itself be an agreement and declaration by "the people" of the proposed States. See *supra*, pp. 39-40. Congress evidently wished to entrench the conditions of admission as deeply as possible, binding every citizen of the new States, in a solemn undertaking by the people themselves, and defeasible only by them if and when the Congress consented.

c. But this is more than assumption. When we return to the legislative history of the Enabling Act that sanctioned the admission of Washington and three other States, we are left in no doubt that when the Congress spoke of "the people" of the State it meant all eligible voters, not the legislature. So far as we can determine, in the long debates over the admission of these States, not a single speaker confused the two things. See 19 Cong. Rec. 2802-2808, 2831-2838, 2880-2889, 2909-2915, 2996-3004, 3037-3043, 3081-3093, 3117-3140 (1888); 20 Cong. Rec. 795-797, 798-828, 862-873, 899-915, 934-952 (1889).

While the disclaimer clause provoked little discussion (but see *supra*, pp. 44-45), there was heated debate both in the House and Senate about the appropriate procedure for admitting the proposed States. This furnished ample opportunity for Representatives and Senators to make clear what they meant by "the people." *E.g.*, 19 Cong. Rec. 2804, 2883, 3001, 3117, 3120, 3135, 3136 (1888); 20 Cong. Rec. 801, 869 (1889).

Two examples are perhaps sufficient as illustrating both the meaning attached to the term and the prevailing view that a State constitution, or any alteration of it, must be ratified by a popular vote. The first is the statement of Senator Platt, the Chairman of the Committee on Territories and floor-leader for the bill. In presenting the bill to the Senate he explained that the southern part of the Dakota Territory had already framed a constitution, approved by popular vote, but that "minor changes"—of boundary and name—were now proposed (19 Cong. Rec. 2804 (1888)).[32] Senator Platt continued (*ibid.*):

> This of course changes the constitution and necessitates the acceptance by the people of the constitution as thus changed, which is provided for in the last four sections of the bill; and that being necessary, the committee have thought

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[32] This was before the Senate Committee accepted the clauses of the House bill, which would require further changes in the State constitution. 19 Cong. Rec. 2832 (1888). See *supra*, p. 44.

proper to provide that the whole constitution should be resubmitted to the people.

A second illustration of the congressional view is Senator Plumb's criticism of an attempt to admit the State of Kansas without popular approval of the draft constitution (19 Cong. Rec. 3117-3118 (1888)):

> After the adoption of that constitution by the convention in the fall of 1857 and the failure to submit its work to the people, the Legislature of the Territory of Kansas submitted the question directly to the people as to whether they desired admission into the Union under the Lecompton constitution, and at an election held for that purpose on the 4th day of January, 1858, nearly nine-tenths of the people of Kansas voted against such admission and repudiated the constitution utterly. Yet, on the 2d day of February following, President Buchanan sent that constitution to Congress, himself alluding to the fact that it did not represent the people of the Territory and to the fact that it had been voted down by a large majority of the people, and he excused himself for thus asking that the will of the people should be overridden by saying that it was common for people to commit to their representatives the exercise of authority which they did not afterwards desire nor expect to pass in judgment upon.
>
> The Senator will remember the struggle which ensued the effort to admit the State under a constitution which not only had been adopted in violation of the expressed wish of the people of

> the Territory, which had been voted down by them by an overwhelming majority, but a constitution which in terms fastened upon them an institution which they held in utter and eternal abhorrence, and which their presence in the Territory of Kansas was a protest against.

Enough has been said to show what the 50th Congress meant by "consent of the people." If more were required, we would point to the Enabling Act itself. It not only prescribes in some detail the manner in which the constitutional conventions shall be held (Sections 3-5, 25 Stat. 676-678), but requires in each case that the newly framed constitution be submitted to popular approval. Sections 3, 5, 7, 8, 25 Stat. 676-679. Plainly, the Congress of 1889 was clear that "the people" of each new State should speak for themselves and not through their legislatures.

We conclude that the "consent of the people" in the Washington Enabling Act, and, therefore, in Article XXVI of the Washington Constitution, meant what it said, the acquiescence of a majority of the eligible citizens, voting for themselves, not "the state of Washington speaking through the legislature." Once again, those who framed Public Law 280 were correct in assuming that the State constitution contained a "legal impediment" that must be removed by constitutional amendment in the usual way.

The conclusion that Washington has not effectively removed the bar of Article XXVI excuses us from reaching the difficult question already adverted to under the Due Process and Equal Protection Clauses:

whether, consistently with those federal constitutional provisions, the State could fashion a special, less scrupulous, rule for overriding an impediment in its own constitution, applicable only when Indians are involved. See *supra*, p. 20. Instead, we turn briefly to the suggestion that, however correct, our submission comes too late: that settled arrangements ought not be disturbed by a belated discovery of the true meaning of Section 6 of Public Law 280.

5. *Practical and equitable considerations*

a. At the outset, it is right to stress that the Indian Tribes of Washington cannot be held guilty of laches in raising the disclaimer issue. The first of the disclaimer States to invoke Public Law 280 was Washington in 1957. But the statute enacted in that year asserted State jurisdiction only with tribal consent. Those Tribes that petitioned for State protection under that law were not in the best position to challenge it as *ultra vires*. Even so, an individual member of the one of the Tribes within the Tulalip Reservation did assert the disclaimer argument as early as 1958, only to have the State Supreme Court reject it. *State* v. *Paul*, *supra*. Other, non-consenting Tribes, including the Yakima Nation, lacked standing to complain, being unaffected by the 1957 statute.

State jurisdiction regardless of tribal consent was first asserted in 1963, by the Washington statute now before the Court. It was promptly challenged by the Quinault Tribe in the federal courts, *inter alia*, on the disclaimer issue. Both the district court and the

court of appeals denied the claim and the Tribe petitioned for ceriorari. But this Court declined to hear the case. *Quinault Tribe* v. *Gallagher*, *supra*.[33] Nevertheless, the Tribes continued to press the contention that the 1963 Washington statute was unauthorized because the State had failed to amend its constitution. On three occasions, the issue was at least potentially in cases that reached this Court. *Makah Tribe* v. *Washington*, *supra*; *Tonasket* v. *Washington*, *supra*; *Comenout* v. *Burdman*, *supra*. For varying jurisdictional or jurisprudential reasons, however, the Court did not resolve the question.

None of the other disclaimer States has succeeded in unilaterally asserting exclusive jurisdiction over Indian country,[34] and, since 1968, none can. This

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[33] The United States shares some responsibility for that disposition. Although we urged the Court to grant the petition for certiorari, *inter alia*, on the disclaimer issue, we suggested that the court of appeals had correctly rejected the claim. See Memorandum for the United States in No. 1040, O.T. 1966, pp. 6-7.

[34] We put to one side Arizona's very limited assertion of water and air pollution jurisdiction within reservations. See *McClanahan* v. *Arizona State Tax Comm'n.*, *supra*, 411 U.S. at 177-178 n. 17. Without expressing a concluded view on the matter, we submit that is arguably within the principle of the rule condoned by *McBratney* and *Village of Kake*, *supra*. We note, however, that in 1964 Montana, acting with tribal consent but without constitutional amendment, asserted criminal jurisdiction over the Flathead Reservation. See *Kennerly* v. *District Court*, *supra*, 400 U.S. at 425. That statute was unsuccessfully challenged in the State courts. *McDonald* v. *District Court*, 159 Mont. 156, 496 P.2d 78. A limited provision asserting criminal and civil jurisdiction over high-

Court's 1973 opinion in *McClanahan* v. *Arizona State Comm'n.*, *supra*, 411 U.S. at 177-178, might well have been read as sustaining the disclaimer argument. At least until the subsequent Orders in *Tonasket* and *Comenout* two years later, the Tribes of the disclaimer States may be excused for believing they had won the point. Yet, in Washington, their apparent success was not acknowledged and, once again, one of the affected Tribes has raised the issue.

Plainly, no one can charge that the Indians have not made prompt and repeated efforts to interpose the disclaimer objection to State assertion of jurisdiction over them. The State of Washington, on the other hand, has had ample opportunity to moot the argument by simply submitting the question of assuming jurisdiction over Indian country to its own citizens. But it is said that, equities aside, now to unsettle arrangements long in existence would be too disruptive. We examine that claim.

b. In our view, the matter has been grossly overstated. To begin with, except for the very narrow pollution control asserted by Arizona, perhaps consistently with its disclaimer (see note 34, *supra*), Washington and Montana are the only disclaimer States that had effectively assumed new jurisdiction over Indian country under Public Law 280 before 1968. Even if we treat Idaho as in the same category, the practical situation there is markedly dif-

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ways within Indian Reservations in South Dakota was, on the contrary, struck down by the State Supreme Court. *Petition of Julia Hankins*, 80 S.D. 435, 125 N.W.2d 839.

ferent since, as we are told, the tribal courts in fact exercise jurisdiction over those matters which the State claims concurrent power to deal with (see J.S. 59). There are, to be sure, statutes in Utah, Idaho, Montana and indeed Washington, enacted before 1968 or since, that provide for State jurisdiction with tribal consent; but, Washington and Montana aside, no valid consent has been given. And see *Kennerly* v. *District Court*, *supra*.[35] As a practical matter, then, the only arguable "disruption" resulting from sustaining the disclaimer argument will occur in Washington and on the Flathead Reservation in Montana, where only criminal jurisdiction is involved.

Turning to Washington, there are some 20,000 reservation Indians, distributed between 23 distinct reservations. The two largest groups, by far, are the Yakimas and the Colville, together accounting for well over half the reservation Indians of the State. Ten of the Tribes, including the Colville, have consented to full State jurisdiction. As to them, numbering some 8,000, the *status quo* may continue, provided only the people of the State and the members of the Tribe are willing. For the rest, half of whom belong to the Yakima Nation, they would of course welcome an end to State intervention, which, in any event, is only very partial protection. Indeed, in their case,

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[35] In *Kennerly*, this Court held ineffective an attempted assertion of State jurisdiction over the Blackfeet Tribe in Montana, which was predicated, not on a State statute, but on a tribal ordinance which had not been submitted to the members for approval.

law enforcement would be much simplified by the termination of State jurisdiction under Public Law 280. At present, the unconsenting Indians of Washington are subject to three sovereignties, according to a complex checkerboard pattern that is so difficult to master that a schematic chart is needed to illustrate it. See Appendix B, *infra*. Henceforth, in all that directly affects them, jurisdiction would be divided along relatively clear lines between federal and tribal authorities. In light of the confused and concededly unsatisfactory situation now prevailing, it may be doubted if the ruling we urge upon the Court would have any substantial "unsettling" effect.

c. Finally, we ought not lose sight of the fact that national policy for a decade at least has been to encourage Indian self-government, prohibiting State interference in Indian affairs except with the full consent of the affected Tribe. While Congress did not require States validly asserting jurisdiction over Indian country before 1968 to retrocede it or obtain tribal acquiescence for its continuance (25 U.S.C. 1323(b)), that result was encouraged. See 25 U.S.C. 1321(a), 1322(a), 1323(a), 1326. Considering that the hearings on the Indian Civil Rights Act began as early as 1961, it is something of a historical accident that Washington assumed partial jurisdiction without tribal consent in 1963, before Congress had finally settled on legislation to forbid such unilateral State action for the future. Of course, if Washington's law is valid, the State is entitled to maintain it notwithstanding Indian objection and the resulting friction.

But we cannot properly overlook a flaw, even if only procedural. See *Kennerly* v. *District Court, supra.* It cannot be improper to urge the Court to notice the invalidity of State action which promotes discord and contravenes the now settled policy of the Nation.

II. THE PARTIAL JURISDICTION ISSUE

If we assume (notwithstanding the submission just concluded) that Washington's failure to repeal or amend Article XXVI of the State Constitution was no bar to asserting jurisdiction, the question arises whether the State was free to assume only *partial* jurisdiction over Indian reservations within the State. The issue has both a statutory and a constitutional dimension. As we have seen, the court of appeals *en banc* (by a vote of 7 to 5) rejected the argument that Public Law 280, before its amendment in 1968, did not authorize the kind of selective jurisdiction asserted by Washington in 1963, whereas, on remand, a panel of the same court held the State statute violative of the Equal Protection Clause. For our part, we address only the statutory question—albeit with an eye to the constitutional objections that would be presented if Public Law 280 were construed as permitting the result Washington has sought to achieve in its 1963 legislation.

In answering the question whether Public Law 280, as originally enacted, authorized the option States to assert only partial jurisdiction, we first focus on Washington's legislation. In 1963, a very complex scheme was enacted, State criminal jurisdiction some-

times depending on the race and age of the offender, the nature of the crime, and the title status of the land where it occurred. After noting the practical consequences of the legislation, we ask ourselves whether the Congress of 1953 meant to condone such a confused result. Examining both the text of Public Law 280 and other evidence, we conclude that Washington's 1963 law is *ultra vires*.

A. The Washington Legislation

1. Although only the 1963 State statute is directly involved, it is useful to look briefly at the earlier legislation. Washington first invoked the authority given it by Public Law 280 in 1957. In that year, the State enacted Chapter 240, Laws 1957 (*infra*, pp. 12a-14a), by which it bound itself to assume "criminal and civil jurisdiction" over the persons and lands of any Indian Tribe whose governing body [36] expressed a desire to "be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law." §§ 1 and 2. Sixty days after receiving such a resolution from the Tribe, the State Governor was to issue a proclamation "to the effect that such [criminal and civil] jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body in-

[36] Interestingly, an exception was made for the Colville, Spokane and Yakima Reservations. In those special cases, a resolution of the tribal council was ineffective unless ratified by two-thirds of the adult enrolled members. See § 2 proviso.

volved" (§ 2), and, after a further 60 days, State criminal and civil jurisdiction would take effect, both criminal and civil laws henceforth having "the same force and effect" within the designated Indian country as elsewhere in the State. §§ 3 and 4.

Significantly, no provision was made for the State to assume only partial jurisdiction. On the face of the 1957 statute, the only choice would seem to be full criminal and civil jurisdiction over all persons [37] and all lands within any reservation. And, so far as we are advised, the nine Tribes that elected State jurisdiction before 1963 came fully under State law.[38] See *Tonasket* v. *State*, *supra*, 84 Wash.2d at 166-167 n. 2, 525 P.2d at 746 n. 2. It seems probable that, at the time, the Washington legislature read Public Law 280 as forbidding a selective assertion of jurisdiction, except only as it condoned including or excluding an entire reservation.

2. There was, however, a change of mind in 1963, when the present law was enacted. Although Tribes might still petition for subjection to State law (RCW

[37] Section 3 expressly referred to "offenses committed by or against Indians" and Section 4 to "civil causes of action between Indians or to which Indians are parties." Presumably, disputes not involving Indians were already deemed subject to State jurisdiction under the *McBratney* rule. See note 2, *supra*.

[38] The Swinomish Tribe chose to submit to the State criminal jurisdiction only, but that was under the 1963 law which expressly gives this option. RCW § 37.12.021, *infra*, p. 16a. The Colville Tribe, although electing State jurisdiction only in 1965, elected full criminal and civil jurisdiction.

§ 37.12.021, *infra*, p. 16a),[39] the State now purported to assert some jurisdiction regardless of tribal consent. Henceforth, full State criminal and civil jurisdiction attached to all *unrestricted* lands within every Indian reservation and to everything that happened there, whether involving Indians or not. But, absent tribal acquiescence, Indians[40] generally remained beyond the reach of State law when on tribal lands held in trust by the United States or allotted lands subject to a restriction against alienation. To this exemption, however, there were eight exceptions: for certain matters, including juvenile delinquency and motor traffic regulation, the State asserted jurisdiction over everyone, everywhere.[41] RCW § 37.12.010, *infra*, p. 15a.

We cannot state with assurance the precise impact of the 1963 law for those Tribes, like the Yakima, who never agreed to State jurisdiction. But, accepting the State's construction of its own statute, and limiting ourselves to criminal cases arising within the boundaries of a reservation, the following results, at least, seem clear:

(a) State jurisdiction sometimes depends on the *race* of the offender[42] (*e.g.*, the assault of an Indian on tribal trust lands is a State offense if committed by a non-Indian, but not if the offender is himself an Indian);

(b) State jurisdiction sometimes depends upon the *age* of the offender (*e.g.*, the assault of

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[39] As already noted, the new optional provision apparently permitted a Tribe to submit to only criminal or only civil jurisdiction. The special proviso with respect to the Colville, Spokane and Yakima Reservations (see note 36, *supra*) was deleted.

[40] The scope of the exemption is not entirely clear. Because the provision recites that State jurisdiction "shall not apply *to Indians* when on their [restricted] lands" (RCW § 37.12.010, *infra*, p. 15a), we assume a non-Indian committing an offense against an Indian on trust land is subject to State law, as the State apparently maintains (see Wash. Br. 6, 38). Arguably, however, another section of the statute indicates that the exemption embraces all offenses on trust lands "by or against Indians." See RCW § 37.12.030, *infra*, p. 16a. In civil litigation, on the other hand, we suppose State jurisdiction does not reach a dispute arising on Indian trust lands whenever an Indian is a party, whether as plaintiff or defendant. See RCW § 37.12.040, *infra*, p. 17a.

[41] The other excepted categories are: "(1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; * * * (6) adoption proceedings; [and] (7) dependent children * * *."

[42] We use the term "race" as shorthand, although it is not strictly accurate. First, we assume Washington's law treats as "Indians" only members of federally recognized Tribes. See *Morton* v. *Mancari*, 417 U.S. 535, 553 and n. 24; *United States* v. *Antelope*, 430 U.S. 641, 646 n. 7. Indeed, it may be that the partial exemption from State jurisdiction embraces only those entitled to membership in the particular Tribe assigned to the reservation, regardless of full Indian blood. See *Santa Clara Pueblo* v. *Martinez*, No. 76-682, decided May 15, 1978. On the other hand, a person with no Indian blood may be deemed an "Indian" for jurisdictional purposes if "adopted" . . "naturalized" by a Tribe. See *Alberty* v. *United States*, 162 U.S. 499; *Nofire* v. *United States*, 164 U.S. 657; *Cherokee Intermarriage Cases*, 203 U.S. 76.

an Indian by another Indian on tribal trust lands is a State offense if committed by a minor, but not if the offender is an adult);

(c) State jurisdiction sometimes depends on the *status of the land* where the incident occurs (*e.g.*, the assault of an Indian in his home by another Indian is a State offense if the victim holds his land by an unrestricted fee patent, but not if it remains subject to a restraint against alienation);

(d) State jurisdiction sometimes depends upon the *subject matter* (*e.g.*, an Indian who violates the traffic code on tribal trust lands commits a State offense, but the same person in the same place is not amenable to State law if he assaults another person (whether Indian or non-Indian)).

3. To be sure, one can find precedents in Indian law for jurisdiction based on race (*e.g.*, 18 U.S.C. 1152, 1154), or subject-matter (*e.g.*, 18 U.S.C. 1153), or title to land (*e.g.*, 18 U.S.C. 1151(c), 1154(c)), and age is not an unusual criterion for determining which tribunal has competence. But, so far as we are aware, the Washington scheme is unique in bringing into play all four factors within any single Indian reservation.[43]

The 1963 statute under consideration re-introduces for all reservations where some lands are held in fee and the Tribe had not consented to full State jurisdiction the "impractical pattern of checkerboard juris-

[43] See note 50, *infra*, p. 75.

diction" which requires "law enforcement officers operating in the area * * * to search tract books" in order to determine whether an offense is within their competence. *Seymour* v. *Superintendent*, 368 U.S. 351, 358; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 478. Nor is this all. Unless the matter clearly falls within one of the eight special categories, State or County police investigating a crime determined to have occurred on restricted land must still ascertain whether the probable offender is or is not an Indian, and if so, whether he is a juvenile. And like determinations must be made by federal and tribal officers, since under the Washington law all three sovereignties retain some criminal jurisdiction within Indian reservations. See Appendix B, *infra*.

Not surprisingly, the upshot is inefficient criminal law administration. No doubt, cooperative arrangements might alleviate the problem; but, obviously enough, the incentive for such agreements, and their good faith implementation, is lessened when the division of jurisdiction is not consensual, but imposed by the State over tribal objection.

4. Such are the consequences of Washington's 1963 law. Of course, the Tribes that have not done so may resolve the chaos by allowing the State to assume full jurisdiction. That option was once invoked by the Court of Appeals for the Ninth Circuit, and subsequently by the Washington Supreme Court, as a ground for holding that the 1963 statute did not work a partial assumption of jurisdiction. See *Quinault Tribe of Indians* v. *Gallagher*, *supra*, 368

F.2d at 657-658; *Makah Indian Tribe* v. *State*, *supra*, 76 Wash.2d at 492, 457 P.2d at 594. In this case, however, the court of appeals has abandoned reliance on that rationale (see J.S. 39-40, 42-45, 48-49) and, in this Court, the State—albeit with occasional lapses (Wash. Br. 36, 38, 42)—seems to accept that Washington's 1963 scheme must be treated as asserting limited jurisdiction only.

This is plainly right. The State, not the affected Tribes, unilaterally decided in 1963 to assert partial jurisdiction.[44] To be sure, the Tribes were then told, "if you wish, you can make our jurisdiction total, especially if you find that the crazy quilt we have created for you is wholly unsatisfactory." At least two of the Washington Tribes have succumbed, preferring total immersion to being doused with cold water. But no one will suggest that a wholly free choice was involved. To use an extreme, but not wholly remote, analogy, it is like saying to parents, "we will separate you from your children, unless of course you too will submit to our care." In those circumstances, it would be disingenuous to estop the

[44] There is no evidence that in 1963 the Washington Tribes who had not then consented to State jurisdiction asked to have their trust lands partially excluded. We do not know what informed the legislative decision. But it may be that the State was reluctant to incur the burden of assuming general criminal jurisdiction over intra-tribal offenses in areas closed to non-Indians and therefore of less concern to other residents of the reservation. The continuing option of full jurisdiction, it may have been supposed, was unlikely to be invoked by any Tribe that had resisted the invitation since 1957.

parents from challenging the separation because they held the key to the problem in their own hands. So here. If Public Law 280 condemns partial assumption of jurisdiction, the State's action is not immunized because the affected Tribes *could* cure the defect if they were willing, as they are not, to abandon the free choice which Congress secured to them in 1968 to retain what little measure of self-government is left to them.

We have said enough. Washington's 1963 law must stand or fall as a partial assumption of State jurisdiction. The question is whether the Congress of 1953 meant to authorize such a piecemeal erosion of Indian reservations. We think not.

B. The Options Contemplated by Public Law 280

In our submission, Public Law 280 did not authorize the option States selectively to assert partial jurisdiction over Indian reservations. Although the matter is open to question, we believe those States were free to assume jurisdiction over some reservations and not others. So also, it is arguable that only criminal, or only civil, jurisdiction might be asserted. But in our view, the option States were given no other choices. This conclusion is, we suggest, compelled by both the text of Public Law 280 and such pointers as there are in the legislative history of the original Act and its amendment in 1968.

1. *The Text of the Statute*

We may begin with Sections 6 and 7 of Public Law 280, applicable to option States like Washing-

ton."[45] What is immediately apparent is that those Sections are not complete in themselves. The "civil and criminal jurisdiction" spoken of in Section 6 is not there defined: we are merely told that it is to be "in accordance with the provisions of this Act." And, similarly, in Section 7, for the meaning of "jurisdiction with respect to criminal offenses or civil causes of action," we are referred elsewhere: "as provided for in this Act." Indeed, read in isolation, Sections 6 and 7 do not even disclose that Indians or Indian country are involved. And so, we must turn to the other substantive provisions of Public Law 280, Sections 2 and 4.

It is only by looking to those Sections that we learn that the "criminal jurisdiction" mentioned in Sections 6 and 7 embraces all "offenses committed by or against Indians in * * * Indian country," and that "civil jurisdiction" connotes "civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country," except only that the State is not free to alienate, encumber or tax restricted Indian property, or to infringe Indian hunting and fishing rights guaranteed by treaty or

[45] Section 6, as we have sufficiently explained, is uniquely applicable to the so-called disclaimer States. But it may well be, as has been generally assumed (see J.S. 41 n. 3, 52 n. 6), that Section 7 applies to all option States, both those subject to Section 6 and those without "legal impediments" to assuming jurisdiction. Thus, a disclaimer State (like Washington) would *first* comply with Section 6 by amending its constitution, and *then*, under Section 7, enact "affirmative legislative action."

federal statute. What is more, Sections 2 and 4 tell us that the consequence of assuming "criminal and civil jurisdiction" is that the State "criminal laws" and "civil laws * * * of general application," henceforth, "shall have the same force and effect within such Indian country as they have elsewhere within the State," and that the special federal criminal jurisdiction provisions (18 U.S.C. 1152, 1153) cease to be applicable.

In the absence of any hint in the text that partial State jurisdiction was contemplated, the natural reading of the relevant Sections of Public Law 280 is that the option States were given consent to place themselves in the same posture as the mandatory States—nothing more or less. Very probably, since entire reservations were exempted in three of the mandatory States, the same kind of exemption was intended to be left open to the option States. Perhaps these States were not required to assume *both* criminal and civil jurisdiction.[46] But there is no basis for

[46] The argument for this choice is based on the reference in Section 7 to "jurisdiction with respect to criminal offenses *or* civil causes of action, *or* with respect to both." But the quoted clause directly adverts only to that jurisdiction which the State lacks. Obviously, where the particular State already enjoyed criminal jurisdiction over a reservation (as in the case of North Dakota with respect to the Devils Lake Reservation, 60 Stat. 229), the effect of Public Law 280 would only be to permit the State to assert civil jurisdiction as well. Although Counsel to the House Committee apparently read it otherwise (see 1953 Hearings at 24), the disjunctive in Section 7 may well be intending nothing more than to allow States to make their jurisdiction "full." Section 6, we note, speaks of the "assumption of civil *and* criminal jurisdiction," and it will not

reading into the Act a complete freedom for the option States to pick and choose at will, redefining "Indian country," limiting criminal jurisdiction to offenses "against" Indians but not "by" them, or selecting only some "criminal laws" for enforcement on reservations.

We think it plain that authority for such a result cannot be found in the clause of Section 7 which permits an option State "to assume jurisdiction at such time and *in such manner* as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof." We have already adverted to the probable purpose of the clause: to allow the decision to be made with or without referral to popular approval, as the State chose. We may assume that "in such manner" also condoned a procedure whereby the consent of the affected Tribes would be made a condition of assuming jurisdiction. But "in such manner" cannot be made to do service for "to such extent."

In our submission, Public Law 280 on its face forecloses the kind of selective jurisdiction asserted by Washington in 1963. But we need not rest on the text alone. Other evidence confirms our conclusion.

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do to suggest that the following words, " 'in accordance with the provisions of this Act,' " are merely a reference to Section 7 (Wash. Br. 46 n. 18): the relevant "provisions" must include Sections 2 and 4, which require the mandatory States to assume both civil and criminal jurisdiction.

2. *Other Evidence of Congressional Intent*

a. When we reexamine the legislative history of Public Law 280 for some indication on the partial assumption issue, we first notice the total absence of any suggestion that State jurisdiction, where asserted, would be less than full. To be sure, with respect to the mandatory States, some reservations were wholly exempted, and, as we have said, we assume the option States were free to do likewise. As the State points out (Br. 45), the Committee Reports suggest that Section 7 left that door open. H. R. Rep. No. 848, *supra*, at 7; S. Rep. No. 699, *supra*, at 6. But, except for total exemption of an entire reservation (or perhaps all that part of a reservation within a county),[47] it is nowhere intimated that a State would be free to impose only *some of its criminal laws*, or reach only *some of the residents* of an included reservation, or assert jurisdiction over only *some plots* within it.

This silence is not neutral. Indeed, we know that some States, notably Nevada, were reluctant to assume jurisdiction over Indian country because of the heavy financial burden involved. Congressman Young of Nevada made the point, urging a federal subsidy and objecting to the inclusion of his State among

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[47] The portion of the Report quoted by the State (Br. 45) can be read as impliedly condoning a county-option plan which could result in bringing under State jurisdiction only part of a reservation when the reservation overlaps county lines. On the other hand, it may be that the Report is merely explaining the Nevada dilemma and suggesting that time is needed for the State as a whole to reach a decision.

the mandatory States when that was not forthcoming. 1953 Hearings at 7-8, 33. And others noted the same objection. *Id.* at 10, 11, 23, 26, 30; H.R. Rep. No. 848, *supra*, at 7. This, it would seem, was the occasion for someone to respond that Nevada and other similarly-situated States need not assume full jurisdiction, that they might selectively impose only some of their laws, avoiding the heavy expenditures that were feared. But there was no such interjection. Repeatedly, speakers mentioned "jurisdiction," or "civil and criminal jurisdiction," without qualification. 1953 Hearings at 3, 4, 6, 9, 10, 12, 17, 23, 26, 28; 99 Cong. Rec. 10782, 10783 (1953). See also H.R. Rep. No. 848, *supra*, at 6-7. And, with particular reference to Nevada, one Committee Member commented: "If Nevada does not want to take this on and does not feel they should be obligated to take this expense, they certainly do not need to pass any legislation to take it on." 1953 Hearings at 30. Likewise, the Report referred to by the State (Br. 45) adverts to such States "acquiring jurisdiction in the future." There is no suggestion that reluctant States might "take on" only "a part" of the jurisdiction now tendered.

b. The focus of the 83d Congress on full-fledged assumption of jurisdiction by the States is entirely consistent with the premises underlying Public Law 280. We can identify at least three concerns informing congressional action in 1953: (1) a view that Indians ought, so far as possible, be "assimilated" into the general population; (2) a desire to diminish

federal responsibility for the Tribes, with the attendant cost to the national treasury; and (3) the prevailing hiatus in law enforcement on most reservations. Each of these considerations counseled a total, not a partial, transfer of jurisdiction to the States.

What has been called the "termination fever" [48] of the period had almost reached its full maturity in 1953. To be sure, Public Law 280 did not itself abolish reservations or the treaty rights of the Tribes, and it was still possible to wholly exempt certain reservations from State jurisdiction. Moreover, as we have seen, some States remained hesitant to assert jurisdiction, at least without the power to tax Indian property or a compensating federal subsidy. But, within those limits, the congressional mood was plainly in favor of ending the special status of Indians and to pull down the reservation fences that kept out State law. See 1953 Hearings at 5, 15, 16; H.R. Rep. No. 848, *supra*, at 3-5. That goal, obviously enough, argued for the fullest assertion of State jurisdiction: it would be little, if at all, advanced by selective and limited imposition of State laws.

It is equally clear that the objective of disentangling the federal government from its responsibilities towards the Tribes, and lessening its financial burden (see 1953 Hearings at 7; 99 Cong. Rec. 9263 (1953)), would be better served if the States, when they asserted jurisdiction, did so fully. If the States were

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[48] American Indian Policy Review Commission, *Final Report*, vol. 1, p. 199 (1977).

free to pick and choose, there was a risk that some might not take the sour with the sweet, leaving the national government with the most burdensome obligations.

But the most vocalized concern underlying Public Law 280, as this Court has noted (*Bryan* v. *Itasca County*, 426 U.S. 373, 379), was "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." See, also, 1953 Hearings at 2-3, 15-16; H. R. Rep. No. 848, *supra*, at 5-6. This "complete breakdown of law and order," to borrow Congressman D'Ewart's phrase,[49] had several causes. As one commentator has explained, "federal law enforcement was typically neither well-financed nor vigorous." Goldberg, *supra*, 22 UCLA L. Rev. at 541. Moreover, as the Committee Reports point out (H.R. Rep. 848, *supra*, at 5), federal jurisdiction did not reach offenses by Indians against Indians except for the 10 "major crimes." See 18 U.S.C. 1152, 1153. And the consequence was that, "[a]s a practical matter, the enforcement of law and order among the Indians in the Indian country ha[d] been left largely to the Indian groups themselves." H.R. Rep. No. 848, *supra*, at 6. Yet, "[i]n many States, tribes [were] not adequately organized to perform that function," thereby producing "a serious hiatus in law-enforcement authority." *Ibid.*; see also 1953 Hearings at 2-3.

[49] Hearings on H.R. 459, H.R. 3235, and H.R. 3624 (State Legal Jurisdiction in Indian Country) before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess. 16 (1952).

Plainly, this "hiatus" would not be removed if States were free to forego assuming jurisdiction in cases where both victim and offender were Indians or where the offense occurred on trust lands. Indeed, it would be very strange if the Congress were now condoning a return to the "checkerboard" jurisdiction that it had largely eliminated only five years earlier. See Act of June 25, 1948, 62 Stat. 683, 757.[50] Nor was it intended that existing federal jurisdiction should complement any new assertion of State jurisdiction. The understanding was that wherever the State assumed jurisdiction, federal criminal law would cease to apply, federal jurisdiction having been "ceded" to the State. 1953 Hearings at 6.

In sum, it may be surmised that the Congress of 1953 was attempting to simplify and rationalize the administration of law on Indian reservations by eliminating at least one limited jurisdiction and subjecting all residents to a single legal system.[51] That aim

[50] Public Law 280 uses the term "Indian country," which includes all land within a reservation, as the House Committee was well aware. See 1953 Hearings at 5, 16. To be sure, some "checkerboarding" inevitably continues with respect to trust lands *outside* a reservation, 18 U.S.C. 1151(c), and that consequence was an inadequate deterrent to the termination of Indian reservations at the turn of the century. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 446-447; *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 590, 615 and n. 48. But it hardly follows that in 1953 Congress was giving the States leave to undo the substantial corrective work it had just undertaken.

[51] We need not reach the question whether Public Law 280 intended to allow *tribal* jurisdiction to subsist concurrently. Doubtless, that was not viewed as a very "live" issue in 1953: Congress was itself exempting for the mandatory States—

could only be defeated by permitting the State to assume only partial jurisdiction within Indian country. Such was the conclusion of the South Dakota Supreme Court in condemning a statute that—with far greater justification and simplicity—asserted full criminal and civil jurisdiction only over highways running through Indian reservations. *Petition of Julia Hankins*, 80 S.D. 435, 125 N.W.2d 839. What was said there applies with added force to the "crazy quilt" created by Washington's 1963 statute (80 S.D. at 443, 125 N.W.2d at 843):

> It seems to us that this legislation does not tend to accomplish or promote the congressional purposes of Public Law 280. To the contrary, it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction where the Federal and Tribal courts already operate, each with limited subject matter jurisdiction.[52]

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presumably contemplating that the other States would do likewise—reservations with functioning tribal law enforcement mechanisms; for the rest, unlike today, there were few active tribal courts.

[52] Also worth noting is an earlier passage from the same opinion (80 S.D. at 442, 125 N.W.2d at 843):

> The title of [Public Law 280] refers to conferring jurisdiction with respect to criminal offenses or civil causes of action committed or arising on an Indian Reservation. Nowhere in the act is it expressly stated that a state could assume jurisdiction over only a portion or part of a reservation.
>
> In defining Indian country in 18 U.S.C.A. § 1151, rights of way running through the reservation are specifically mentioned as being a part of the reservation. We think it reasonable to believe that if the Congress had intended that under Section 6 of Public Law 280, the states could assume jurisdiction over only highways on a reservation, that it would have said so. It is for the Congress and not for us to spell out the manner in which the states may assume the jurisdiction which it relinquished.

c. It remains to deal with the 1968 amendment of Public Law 280 and what was then said about the scope of the original Act. As this Court need hardly be reminded (see, *e.g.*, *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 428-430), Title IV of the Civil Rights Act of 1968 (82 Stat. 78, 25 U.S.C. 1321-1326) (*infra*, pp. 19a-23a) amended Public Law 280 in significant respects. Primarily, tribal consent to the assertion of any new State jurisdiction was henceforth required. See 25 U.S.C. 1321(a), 1322(a), 1326. But, of special relevance to our present submission, the law now expressly condoned *partial* assumption of jurisdiction, criminal or civil, by mutual consent of the State and the affected Tribe. And such new jurisdiction may be limited as to subject matter ("such measure") or geographical area ("Indian country or any part thereof"). 25 U.S.C. 1321(a), 1322(a).

Of course, since the Washington statute we are considering was enacted in 1963, these provisions are

not directly applicable.[53] But, on both sides, it is argued that they throw light on the congressional understanding of 1953 when Public Law 280 was enacted. The basic issue is whether the provisions for partial assumption of jurisdiction introduced in 1968 effected a *change*.

The short answer is that there was a conflict of opinion. As the State of Washington correctly points out (Br. 49-51), the Department of the Interior, both in 1963 and 1968, commented in communications to the Congress that the new provision allowing partial assumption of jurisdiction merely made "explicit" a conclusion which, in its view, was already "implicit" in Public Law 280 as originally enacted. Wash. Br. 60, 68-69.[54] But others disagreed. Arthur Lazarus, an attorney representing several Tribes, complained that "[o]ne of the major objections to Public Law 280 is its 'all or nothing' approach, requiring States to assume all jurisdiction in Indian reservations if

[53] Except as the State contends that Congress in 1968 "ratified" its 1963 statute, a point we discuss separately, *infra*, pp. 83-86.

[54] In 1965, however, the Department was suggesting to the Congress that the proposed "extension of criminal jurisdiction to the States on a piecemeal basis needs to be considered further," apparently treating the matter as a *new* idea. Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 320 (1965) (hereinafter "1965 Hearings"). The Department of the Interior has long since abandoned the views expressed in the 1963 and 1968 letters.

any jurisdiction is desired." 1968 Hearings at 116.[55] See, also, *id.* at 113-114. And the Deputy Attorney General, arguing *against* partial assumption, was at least impliedly addressing what he took to be a change effected by the new proposal. 1968 Hearings at 28.[56]

More important, however, is the view entertained by the Congress itself. The State in its Brief (at 56-57) has reproduced an exchange between Senator McClure and Mr. Lazarus in which the Senator notes Interior's statement that partial jurisdiction was always authorized. We do not know whether, at the end of the day, Senator McClure accepted that representation as correct. But we do have a strong indication that Senator Ervin, the primary sponsor of what became the Indian Civil Rights Act, believed his bill would make a new contribution by encouraging States that were reluctant to assume the heavy financial burden of full jurisdiction, henceforth to accept "a piecemeal cession by the Federal Government of jurisdiction over Indian country." 111 Cong. Rec. 1784

[55] Here and elsewhere "1968 Hearings" refers to Hearings on H.R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968).

[56] See, also, the Interior Department report of 1965, note 54, *supra*, in which the Department of Justice is then also represented as opposing partial assumption of criminal jurisdiction:

> The Department of Justice has indicated that this approach in the criminal area is undesirable. Such an extension of jurisdiction may result in unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs. [1965 Hearings at 321.]

(1965); 1965 Hearings at 4. And, significantly, before voting on the legislation, the House of Representatives as a whole was expressly told by Congressman Aspinall, the Chairman of the Committee on Interior and Insular Affairs, that authorization for partial assumption of jurisdiction *was* a change in the law. 114 Cong. Rec. 9615 (1968). This statement carries special weight, coming as it does from one who took an active part in framing Public Law 280 in 1953 and was, accordingly, in a better position than most Members to know the intended scope of the original legislation. See 1953 Hearings at 16, 17, 18, 19, 20, 30-31, 32.

In our submission, the available evidence indicates that the framers of the 1968 amendments believed that in authorizing partial assumption of jurisdiction they were changing the law. That is of course consistent with the general presumption that accords meaning to an otherwise unexplained textual addition. But if the prevailing opinion in 1968 were deemed open to doubt, we must return to the understanding of 1953. At *that* date, as we have seen, no one remotely suggested that piecemeal assumption of jurisdiction by the States was contemplated.

d. Strictly, it is irrelevant why the Congress of 1968 thought it right to condone partial assumption when their predecessors of 1953 thought otherwise. But, in fact, there is no contradiction. As we know, in the mid-1950's the congressional climate favored total federal disentanglement from the "Indian problem" and swift assimilation of the Tribes into the

general population. That policy argued for wholesale transfer of jurisdiction to the States. By 1968, that simplistic approach had been abandoned. What is more, the experience of the intervening 15 years had shown that many States were unwilling to assume the full responsibility offered them in Public Law 280.[57] As Senator Ervin explained (111 Cong. Rec. 1784 (1965); 1965 Hearings at 4):

> Some States claim that Public Law 280 imposes too great a financial burden and that subsidies from the Federal Government are needed if the States are adequately to enforce law on the reservations. In addition, some States indicate that a piecemeal cession by the Federal Government of jurisdiction over Indian country would be more feasible.

And so, now, the panacea of a complete transfer of jurisdiction having failed, "the breakdown in the administration of justice" within Indian country remaining unsolved (*ibid.*), Congress was willing to compromise. But it does not follow that the inefficient crazy-quilt pattern of overlapping jurisdiction deliberately avoided in 1953 was to be freely condoned for the future. There was now an important brake on partial assumption of jurisdiction: a new requirement of tribal consent. That condition, it was under-

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[57] See, *e.g.*, the South Dakota provisions for full jurisdiction described in *Petition of Hankins, supra.* Because assumption of jurisdiction (except for highways) was conditioned on receipt of a federal subsidy, which was not forthcoming, the law never became operative.

stood, would prevent wholly irrational or one-sided arrangements. As Mr. Lazarus put it, once tribal consent was necessary, "[a] piecemeal approach implies negotiation back and forth between the Indians and the state authorities." 1968 Hearings at 113. And, of course, any *consensual* arrangement is more likely to breed cooperation and to minimize jurisdictional disputes.

What is more, it may be doubted whether even the 1968 law was meant to authorize the complex checkerboard scheme enacted by Washington in 1963. Because all arrangements must be by mutual consent, we may assume the 1968 amendments permit very wide flexibility. But, of course, even popular approval does not condone wholly irrational or discriminatory solutions. Cf. *Lucas* v. *Colorado Gen. Assembly*, 377 U.S. 713, 736-737 and n. 29. To take an extreme example, the 1968 law cannot be construed as validating a scheme, although jointly agreed by the State and a majority of tribal members, that withheld access to State courts from members who are not "in good standing." The Act of Congress must be deemed to foreclose any constitutionally objectionable arrangement.

We do not reach the question whether Washington's 1963 law oversteps the line established by the Equal Protection and Due Process Clauses. But there is ground for doubting whether the relevant provisions of the 1968 Act, in authorizing State assumption of criminal or civil jurisdiction over "any part" of Indian country (25 U.S.C. 1321(a), 1322(a)),

meant to permit reestablishing the checkerboard jurisdictional pattern *within a reservation* that Congress itself had condemned 20 years earlier. That would amount to redefining "Indian country" in derogation of 18 U.S.C. 1151. Much more likely, it seems to us, the phrase "any part" of Indian country connotes a discrete geographical area, made up of contiguous tracts.[58]

Of course, the Court need not finally resolve that question here. Yet, if Washington's 1963 law does not pass muster (even assuming tribal consent) under the 1968 Act, this is a further indication how far it is from satisfying Public Law 280 as originally enacted, for not even Washington contends that the State's options were greater before 1968 than they are today.

C. Alleged Congressional Ratification of Washington's Partial Assumption of Jurisdiction

The State of Washington advances in this Court what appears to be a new argument: that, in 1968, Congress "confirmed" or "ratified" the jurisdictional scheme prevailing under the 1963 State statute (Br. 51-58). Primarily, we suppose, Washington is suggesting that the alleged confirmation indicates the validity of its partial assumption of jurisdiction under Public Law 280 as originally enacted. But the

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[58] Thus, for instance, the 1968 amendments would condone a consensual arrangement that applied State law within the cities of Wapato and Toppenish *regardless of land title*—most of the population and land there being non-Indian (Wash. Br. 34-35)—but not elsewhere within the Yakima Reservation.

State is perhaps saying, alternatively: "even if our action was unauthorized at the time, it was validated for the future in 1968." The two points may be taken together.

1. It is first said that Congress was made aware of the decision in *Quinault Tribe of Indians* v. *Gallagher*, *supra*, which rejected a challenge to Washington's 1963 law as an unauthorized partial assumption of jurisdiction. In fact, the only evidence adduced in support of that assertion is a colloquy in *1965* between the Tribal Chairman, the Tribe's attorney and Senator Ervin, at a time when the case was still pending on appeal. Wash. Br. 53-54. We are at a loss to appreciate how this shows congressional confirmation of the subsequent ruling by the court of appeals.

We may, however, assume that the Congress became aware of the Ninth Circuit's decision in *Quinault* some time later. But, without more, we cannot proceed to the conclusion that the result was therefore congressionally approved. Moreover, as the State correctly notes, the holding of that case was *not* that Public Law 280 authorized a partial assumption of jurisdiction. Rather, the court reasoned that the State was willing to assert *full* jurisdiction and that only the Tribe's non-acquiescence produced the limited scheme complained of. See Wash. Br. 52. That somewhat disingenuous rationale has since been abandoned by the Ninth Circuit as a whole (see pp. 65-67, *supra*). But, in 1966, 1967 and 1968, if Congress were focusing on the *Quinault* opinion, it would presumably have been read as *avoiding* the partial jurisdiction issue.

Nor were there, at the time, any other final decisions upholding partial jurisdiction. The Washington Supreme Court did not decide *Makah Indian Tribe* v. *State*, *supra*, until 1969. Indeed, the only square holding on the issue then published was *Petition of Hankins*, *supra*, in which the South Dakota Supreme Court had *invalidated* a State statute asserting limited jurisdiction on the ground that this was *not* authorized by Public Law 280. Thus, if Congress were looking to judicial precedents to guide its work, it would presumably have concluded that existing law did not permit partial assumption of jurisdiction.

2. The State, however, contends that the savings clause in the repeal of Section 7 of Public Law 280 ratified all previous State assertions of jurisdiction, including what Washington had done in 1963. The provision invoked is Section 403(b) of the Civil Rights Act of 1968, 82 Stat. 79, 25 U.S.C. 1323 (b), which reads as follows:

> Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

It is true that the relevant House Committee, at least, had been made aware that three States, Nevada,[59] Idaho and Washington, had assumed partial

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[59] Nevada, we are advised, promptly retroceded all jurisdiction previously acquired, except only for the Ely Colony where the Tribe consented to its continuance. See American Indian Policy Review Commission, *Final Report*, *supra*, at 202, 209.

jurisdiction over portions of Indian country, and that some of the affected Tribes, including the Yakimas, were unhappy about the consequences. Wash. Br. 54-57, 68. And it is equally true that nothing in the 1968 amendments expressly repudiates or condemns those state actions. But it hardly follows that the Congress of 1968 should be viewed as ratifying these isolated assertions of jurisdiction, *even if invalid when made*. There were, after all, far more numerous cases of full assumption, including those accomplished in Washington under the 1957 statute. At all events, we cannot forget that the most authoritative voices in the Congress had said, in effect, that Public Law 280 did not authorize partial assumption of jurisdiction. Plainly, Section 403(b) did not immunize from challenge any prior assertion of jurisdiction. Like any savings clause, it merely did not disturb previous cessions: in its own terms, did "not affect" them. The upshot is that the validity of earlier assertions of jurisdiction is to be judged without reference to the 1968 law.

Nor does the retrocession provision, Section 403(a), 25 U.S.C. 1323(a), support the State. To be sure, we find there a reference to partial jurisdiction. But, carefully read, the Section merely authorizes a State to retrocede so much of its acquired jurisdiction as it chooses. That it may *return* only a part in no way implies that it could validly have acquired less than full jurisdiction over any reservation.

In our submission, the ratification argument is wholly without substance.

D. Practical Consequences

Most of what we have said about the very limited unsettling effect of a ruling accepting the disclaimer argument (*supra*, pp. 56-59), applies equally here. Indeed, for the reasons fully particularized in the dissenting opinion to the *en banc* decision below (J.S. 55-56, 59), invalidating Washington's 1963 law as an unauthorized partial assumption of jurisdiction would have an even lesser impact, affecting primarily some 10,000 Indians in eight Washington reservations, almost two-thirds of whom belong to the Yakima Nation.

In sum, here, also, there is no practical obstacle to upholding the limitations imposed by Public Law 280. The only consequence would be to end a wholly inefficient jurisdictional scheme and to permit new accommodations between the affected Indian Tribes and the State to be negotiated at arm's length. That was the congressional goal in requiring tribal consent for the future and encouraging retrocession for the past. It was, only recently, the announced policy of Washington's Governor. See Hearings on S. 2010 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., Pt. 2, 480-489 (1976). No one need fear such a benign result.

Of course, the Court cannot legislate this outcome merely because it is desirable. But, there ought be no reluctance to restore the original congressional understanding. As one examines the history of the implementation of Public Law 280, it is difficult to avoid

the conclusion that the State of Washington fuliy appreciated the dilemma it faced under the new federal law. After a decade, it simply overstepped the limits imposed. Unfortunately, its action was condoned by the federal courts, no doubt in part misled by the equivocation of federal officials. A decade later, a majority of the court of appeals was unwilling to disturb the status quo. Today, at long last, the issue reaches this Court on plenary consideration. As it happens, every consideration now argues for returning the decision to the parties themselves, where it always belonged. It is not too late.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTES INVOLVED

1. Enabling Act for the Admission of Washington and Other States (25 Stat. 676), Section 4

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

* * * * *

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the

Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States: that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United

States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

2. Constitution of the State of Washington (1889), Arts. 26 and 23

ARTICLE XXVI

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing

in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and execpt such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

ARTICLE XXIII

AMENDMENTS

§ 1. *How Made.* Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval at the next gen-

eral election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution, and proclamation thereof shall be made by the governor: Provided, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such (each) amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

§ 2. *Constitutional Conventions.* Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

§ 3. *Submission to the People.* Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people.

3. Public Law 280 (67 Stat. 588)

AN ACT To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and

effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the

chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be,

to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

4. Washington Laws, 1957, ch. 240

§ 1. The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

§ 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this chapter: *Provided*, That with respect to the Colville, Spokane, or Yakima tribes or reservations, he shall not issue such proclamation unless the resolution of the tribal council has been ratified by a two-thirds majority of the adult enrolled members of the tribe voting in a referendum called for that purpose.

§ 3. Sixty days from the date of issuance of any proclamation of the governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to

the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and the criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

§ 4. Sixty days from the date of issuance of any proclamation of the governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the Indian lands prescribed in the proclamation to the same extent that this state has jurisdiction over other civil causes of action and those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such Indian lands as they have elsewhere within this state.

§ 5. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

§ 6. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or

with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

§ 7. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

5. Washington Laws 1963, ch. 36 (codified in RCW §§ 37.12.010-37.12.070 (1964))

37.12.010 *Assumption of criminal and civil jurisdiction by state.* The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal juris-

diction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 *—Resolution of request—Proclamation by governor, 1963 act.* Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

37.12.030 *Effective date for assumption of jurisdiction—Criminal causes.* Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 *—Civil causes.* Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.050 *State's jurisdiction limited by federal law.* The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 *Chapter limited in application.* Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to

possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.

37.12.070 *Tribal ordinances, customs, not inconsistent with law applicable in civil causes.* Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

[N.B. Except for the addition of the words "and tidelands" and "Indian land grants" to Section 37.12.-060, the last three sections above are carried over intact from the 1957 statute.]

6. Civil Rights Act of 1968, Title IV, 89 Stat. 78, 25 U.S.C. 1321-1326

§ 1321

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with re-

spect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Pub. L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78.

§ 1322

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty,

agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.

§ 1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

§ 1324

Notwithstanding the provisions of any enabling Act for the admission of a State, the con-

sent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Pub. L. 90-284, Title IV, § 404, Apr. 11, 1968, 82 Stat. 79.

§ 1325

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the

day following the date of final determination of such action.

Pub. L. 90-284, Title IV; § 405, Apr. 11, 1968, 82 Stat. 80.

§ 1326

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub. L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.

APPENDIX B

CHART I
CRIMINAL JURISDICTION BEFORE PUBLIC LAW 280

LEGEND

W = NON-INDIAN
I = INDIAN
$I_{JR.}$ = INDIAN JUVENILE
O = NO VICTIM

S = STATE JURISDICTION
F = FEDERAL JURISDICTION
T = TRIBAL JURISDICTION
F/T = CONCURRENT FEDERAL AND TRIBAL JURISDICTION

	KIND OF OFFENCE				
	STATUS OF LAND				
RACE AND AGE OF OFFENDER	MAJOR CRIMES		LESSER CRIMES		TRAFFIC OFFENCES
RACE OF VICTIM	TRUST LAND	FEE LAND	TRUST LAND	FEE LAND	ALL
W v. W	1 S	2 S	3 S	4 S	5 S
W v. O	6 S	7 S	8 S	9 S	10 S
W v. W + I	11 F	12 F	13 F	14 F	15 F
W v. I	16 F	17 F	19 F	19 F	20 F
I v. W	21 F	22 F	23 F/T	24 F/T	25 F/T
$I_{JR.}$ v. W	26 F	27 F	28 F/T	29 F/T	30 F/T
I v. W + I	31 F	32 F	33 F/T	34 F/T	35 F/T
$I_{JR.}$ v. W + I	36 F	37 F	38 F/T	39 F/T	40 F/T
I v. O	41 —	42 —	43 T	44 T	45 T
$I_{JR.}$ v. O	46 —	47 —	48 T	49 T	50 T
I v. I	51 F	52 F	53 T	54 T	55 T
$I_{JR.}$ v. I	56 F	57 F	58 T	59 T	60 T

AUTHORITIES

Cases 1-5: *United States* v. *McBratney*, 104 U.S. 621, reaffirmed in *N.Y. ex rel. Ray* v. *Martin*, 326 U.S. 496; and see *United States* v. *Antelope*, 430 U.S. 641, 643 n.2, 644 n.4, 648 n.9.

Cases 6-10: Truly victimless crimes not involving Indians or their property are logically within the *McBratney* rule, *supra*. But see cases 11-15.

Cases 11-15: Presumably, the presence of an Indian victim removes these cases from the *McBratney* rule and brings them under 18 U.S.C. 1152, as construed in *Donnelly* v. *United States*, 228 U.S. 243; and see *Oliphant* v. *Suquamish Indian Tribe*, No. 76-5729, decided March 6, 1978, slip op. 11-12. Concurrent tribal jurisdiction is foreclosed by the ruling in *Oliphant*. These cases probably embrace offences where there is no identifiable victim, but the Indian population of the reservation is immediately endangered, *e.g.*, 18 U.S.C. 832. By virtue of 18 U.S.C. 1151, Section 1152 applies to all land within the reservation, regardless of its trust or unrestricted status.

Cases 16-20: Same as cases 11-15.

Cases 21 and 22: 18 U.S.C. 1153 for federal jurisdiction, status of land being equally irrelevant under this Section. Although concurrent tribal jurisdiction may exist in theory (*Oliphant*, *supra*, slip op. 12 n.14; *United States* v. *Wheeler*, No. 76-1629, decided March 22, 1968, slip op. 11 n.22), such jurisdiction is in practice removed by the severe limitation on tribal court sentencing power imposed by the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(7).

Cases 23, 24 and 25: 18 U.S.C. 1152 for federal jurisdiction; "double jeopardy" exception to 18 U.S.C. 1152, noted in *Wheeler*, *supra*, slip op. 11, implies concurrent tribal jurisdiction.

Cases 26 and 27: Same as cases 21 and 22. Although, if under 18, the offender may be dealt with under the federal Juvenile Delinquency Act (18 U.S.C. 5031-5042), he cannot be surrendered to State authorities under 18 U.S.C. 5032 since the State lacks jurisdiction over Indians within Indian country. Cf. *Fisher* v. *District Court*, 424 U.S. 382.

Cases 28, 29 and 30: Same as 23, 24 and 25: for relevance of age, see cases 26 and 27.

Cases 31 and 32: Same as cases 21 and 22: race of the victim is irrelevant under 18 U.S.C. 1153.

Cases 33, 34 and 35: 18 U.S.C. 1152. Presumably, because of the presence of a non-Indian victim, these cases are not exempted by the first exception to Section 1152, and are the same as cases 23, 24 and 25.

Cases 36 and 37: Same as cases 26, 27, 31 and 32.

Cases 38, 39 and 40: Same as cases 28, 29, 30, 33, 34 and 35.

Cases 41 and 42: There are no truly victimless "major crimes" within 18 U.S.C. 1153.

Cases 43, 44 and 45: Logically, the first exception to 18 U.S.C. 1152 embraces offenses not involving non-Indians. See *In re Mayfield*, 141 U.S. 107; *United States* v. *Quiver*, 241 U.S. 602.

Cases 46 and 47: Same as cases 41 and 42.

Cases 48, 49 and 50: Same as cases 43, 44 and 45.

Cases 51 and 52: Same as cases 21, 23, 31 and 32.

Cases 53, 54 and 55: First exception to 18 U.S.C. 1152. See *United States* v. *Wheeler*, *supra*, slip op. 11.

Cases 56 and 57: Same as cases 26, 27, 36 and 37.

Cases 58, 59 and 60: Same as cases 53, 54 and 55.

CHART 2

CRIMINAL JURISDICTION UNDER WASHINGTON'S 1963 LAW

RACE AND AGE OF OFFENDER	KIND OF OFFENCE / STATUS OF LAND: MAJOR CRIMES		LESSER CRIMES		TRAFFIC OFFENSES
RACE OF VICTIM	TRUST LAND	FEE LAND	TRUST LAND	FEE LAND	ALL
W v. W	1 S	2 S	3 S	4 S	5 S
W v. O	6 S	7 S	8 S	9 S	10 S
W v. W + I	11 S	12 S	13 S	14 S	15 S
W v. I	16 S	17 S	18 S	19 S	20 S
I v. W	21 F	22 S	23 F/T	24 S	25 S
I JR. v. W	26 S	27 S	28 S	29 S	30 S
I v. W + I	31 F	32 S	33 F/T	34 S	35 S
I JR. v. W + I	36 S	37 S	38 S	39 S	40 S
I v. O	41 -	42 S	43 T	44 S	45 S
I JR. v. O	46 S	47 S	48 S	49 S	50 S
I v. I	51 F	52 S	53 T	54 S	55 S
I JR. v. I	56 S	57 S	58 S	59 S	60 S

NOTE

THIS CHART ASSUMES, ARGUENDO, THE CORRECTNESS OF THE STATE'S POSITION THAT:

(1) STATE JURISDICTION, WHEN IT ATTACHES, IS EXCLUSIVE OF BOTH FEDERAL AND TRIBAL JURISDICTION, AND THAT

(2) ALL OFFENCES BY NON-INDIANS ARE SUBJECT TO STATE JURISDICTION ONLY.

AUTHORITIES

Cases 1-10: Same as cases 1-10 in chart 1. Washington's 1963 statute, like Public Law 280 (18 U.S.C. 1162(a)), assumes the *McBratney* rule and deals only with offenses "committed by or against Indians." RCW 37.12.030.

Cases 11-20: RCW 37.12.010, excepting only "Indians," which the State construes as encompassing only offenses committed *by* them.

Case 21: Exempted by RCW 37.12.010 because crime by an adult Indian on trust land. For federal jurisdiction, see chart 1.

Case 22: State jurisdiction under RCW 37.12.010 because on land held in fee.

Case 23: Exempted by RCW 37.12.010 because crime by an adult Indian on trust land. For concurrent federal and tribal jurisdiction, see chart 1.

Case 24: Same as case 22.

Case 25: State jurisdiction under RCW 37.12.010 because motoring offenses are one the eight special subject-matter categories, as to which jurisdiction is asserted regardless of race and land status.

Cases 26-30: State jurisdiction under RCW 37.12.010 because "juvenile delinquency" is one of the eight categories.

Case 31: Same as case 21.

Case 32: Same as case 22.

Case 33: Same as case 23. For concurrent federal and tribal jurisdiction, see chart 1.

Case 34: Same as case 24.

Case 35: Same as case 25.

Cases 36-40: Same as cases 26-30.

Case 41: Same as case 21, but no victimless federal "major crime."

Case 42: Same as cases 22 and 32.

Case 43: Same as case 33. For exclusive tribal jurisdiction, see chart 1.

Case 44: Same as cases 24 and 34.

Case 45: Same as cases 25 and 35.

Cases 46-50: Same as for cases 26-30, 36-40.

Case 51: Same as cases 21 and 31.

Case 52: Same as cases 22, 32 and 42.

Case 53: Same as case 43.

Case 54: Same as cases 24, 34 and 44.

Case 55: Same as cases 25, 35 and 45.

Cases 56-60: Same as cases 26-30, 36-40 and 46-50.

Supreme Court, U. S.
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MAY 15 1978
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,
Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF

of

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; SUQUAMISH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; QUINAULT INDIAN NATION; SWINOMISH INDIAN TRIBAL COMMUNITY; THE TULALIP TRIBES OF WASHINGTON; PORT GAMBLE BAND OF KLALLAM INDIANS; PUYALLUP TRIBE OF INDIANS; QUILEUTE INDIAN TRIBE; SHOALWATER BAY INDIAN TRIBE; SQUAXIN ISLAND INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; LUMMI INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE; SPOKANE INDIAN TRIBE; KALISPELL INDIAN COMMUNITY; NISQUALLY INDIAN COMMUNITY; and HOH INDIAN TRIBE

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Singer v. United States, 323 U.S. 338 (1945) 10

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Supreme Investment Company v. United States, 468 F.2d 370 (5th Cir. 1972) 10

Testa v. Katt, 330 U.S. 386 (1947) 27

Tonasket v. State, 84 Wn.2d 164, 525 P.2d 744 (1974).....4, 6, 28, 29

United States v. American Trucking Assoc. Inc., 310 U.S. 534 (1940) 10

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H.R. 1063, 83rd Congress 1st Session	11
Senate Report No. 699, 83rd Congress 1st Sess.	11
Hearing on H.R. 1063, House Subcom. on Indian Affairs of the Comm. on Int. and Ins. Aff. 83rd Cong. 1st Sess. June 29, 1953	22-23
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October Term, 1977
No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,
Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF

of

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; SUQUAMISH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; QUINAULT INDIAN NATION; SWINOMISH INDIAN TRIBAL COMMUNITY; THE TULALIP TRIBES OF WASHINGTON; PORT GAMBLE BAND OF KLALLAM INDIANS; PUYALLUP TRIBE OF INDIANS; QUILEUTE INDIAN TRIBE; SHOALWATER BAY INDIAN TRIBE; SQUAXIN ISLAND INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; LUMMI INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE; SPOKANE INDIAN TRIBE; KALISPELL INDIAN COMMUNITY; NISQUALLY INDIAN COMMUNITY; and HOH INDIAN TRIBE

INTEREST OF AMICI CURIAE

Amici represent all of the federally recognized Indian tribal governments (excepting respondent Yakima Indian Nation) whose reservations are located within the boundaries of the State of Washington and over whom the state purports to exercise some form of jurisdiction pursuant to Public Law 83-280. Amici have sought and received per-

mission to file this brief from all parties and letters of consent are on file with the Clerk.

The amici tribal governments wish to indicate by the filing of this brief that they are unanimous in their opposition to the unlawful assertions of jurisdiction over them by the State of Washington and that they are now performing or are capable of performing all functions necessary to replace all of the limited services the State of Washington is performing for them pursuant to P.L. 83-280. Since the assertions of state jurisdiction in 1957, all tribes have suffered under a state regime which provides little service but uses P.L. 83-280 to frustrate and destroy the legitimate efforts of the tribal governments to assist the people and maintain their culture.

This Court has noted the destructive impact of P.L. 83-280 on tribal governments. *Bryan v. Itasca County,* 426 U.S. 373 (1976), note 14 at 388. In a recent case the federal district court for Oregon developed many of the reasons for the movement away from the jurisdictional scheme developed under P.L. 83-280. *United States v. Hoodie,* 441 F. Supp. 835 (D.C. Ore., 1977).

Reports on P.L. 83-280 in this state by the Governor's Indian Advisory Council (1971); the National American Indian Court Judges Association (1973); and the American Friends Service Committee (1978); have all concluded that assertions of state jurisdiction are destroying the Indian tribes and the Indian family. The State of Washington asserts in its Brief (p. 37) that pursuant to P.L. 83-280, it will determine the degree of tribal self-government to be allowed. It is clear to the amici tribes that they will not survive state control.

The problems of checkerboard jurisdiction, so recently disapproved by this Court in *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976), have been compounded by the pattern of state, federal, and tribal jurisdiction asserted over the reservations by Washington. For these reasons, amici support the position of the Yakima Nation.

QUESTION PRESENTED

Did the State of Washington, by failing to amend its constitution prior to asserting Indian jurisdiction, violate the statutory requirements of Public Law 83-280?

SUMMARY OF ARGUMENT

I. Section 6 of Public Law 83-280 requires that the State of Washington amend its constitution prior to asserting jurisdiction over Indian country.

II. The decisions of this Court require that the statutory provisions of P.L. 83-280 be strictly construed against the state and tribal governments.

III. The legislative history of P.L. 83-280 shows the intent of Congress regarding the amendment of state constitutions.

IV. The United States maintained jurisdiction in Indian country exclusive of the states until Congress provided a method for asserting state jurisdiction.

V. The amendment of state constitutions was required by federal enabling acts allowing conditional entry into the Union.

VI. The legislative history shows that Congress intended to require Washington to amend its constitution pursuant to section 6 before asserting Indian jurisdiction.

VII. State jurisdiction on Washington reservations was conditioned on constitutional amendment.

VIII. The concept of federalism requires that Washington's constitution be amended prior to asserting Indian jurisdiction.

IX. The proviso in section 6 requires an amendment to Washington's constitution.

X. The necessity of amending Washington's constitution is a federal, and not a state, question.

XI. The rule in the *Quinault* case is inconsistent with the strict construction analysis developed by this Court and should be overturned.

XII. The rule in the *Tonasket* case in inconsistent with the strict construction analysis developed by this Court and should be overturned.

I.

Argument

In 1953, the Congress of the United States enacted Public Law 83-280 (67 Stat. 588) providing a method by which certain states might take some jurisdiction over Indian people and property. Section 2 of that Act turned over jurisdiction to certain named states. Section 6 provided a method by which states entering the Union under federal-state compacts preventing these states from taking Indian jurisdiction could obtain that jurisdiction which was offered under P.L. 83-280. These prohibitions against Indian jurisdiction were usually contained in reciprocal federal enabling act and state constitutional provisions. Section 7 provided a method by which states which did not enter the

Union with a specific impediment to Indian jurisdiction could obtain the jurisdiction they lacked.

The imposition of State Public Law 83-280 jurisdiction on the Indian people has resulted in a good deal of appellate litigation over the issue of whether or not the states, other than those specifically named in Section 2 of the Act, have acted properly to obtain the jurisdiction offered them by Congress under P.L. 83-280. In general, only this Court (in *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423 [1971]; *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 [1973]; and *Bryan v. Itasca County*, 426 U.S. 373 [1976]) has ruled in favor of the Indian tribes' objections to the manner in which states have used Public Law 83-280 to force their laws upon the unwilling reservation peoples.

In the State of Washington, the tribes have always objected to the manner in which the State of Washington attempted to assert P.L. 83-280 jurisdiction over the reservations within state boundaries. In short, Washington acted by passing legislation, (Revised Code of Washington, Chapter 37.12), purporting to take the jurisdiction offered. The tribal governments have always contended that Washington is governed by Section 6 of P.L. 83-280 and must amend its constitution in order to exercise Indian jurisdiction.[1] It is the belief of the tribes that the legislative method, having been

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1. The Ninth Circuit Court of Appeals agreed that Washington was a Section 6 state in *Quinault v. Gallagher*, 368 F.2d 648 (1966). The Washington Supreme Court on the other hand, has taken varying positions on whether Section 6 or 7 applies to Washington. In *State v. Paul*, 53 Wn.2d 337 P.2d 33 (1959), the state court mentioned but did not really rely on Section 6 or 7 and decided that the action of the state legislature in enacting RCW 37.12 had the effect of "supplementing Congressional enactment of P.L. 83-280." In *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960), Section 7 was

required by Section 7 of P.L. 83-280 which governs only that class of states without a federal-state compact preventing Indian jurisdiction, does not affect Washington.

Section 6 of Public Law 83-280 provides:

> Section 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their state constitution or statutes as the case may be.

The Enabling Act for the State of Washington required the State to disclaim jurisdiction over reservation Indians. 25 Stat. 676. The State did so in Article 26 of its Constitution. Although that Article has never been amended or repealed, the State of Washington has proceeded to assert jurisdiction pursuant to various state legislative enactments. See Chapter 240, Laws of 1957 and Chapter 36, Laws of 19[illegible], codified as RCW 37.12.

It would seem clear that this assertion of jurisdiction without amendment of the state constitution is invalid as in conflict with the requirements of Section 6, Public Law 83-280.

However, neither the state courts, nor the Ninth Circuit

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relied on and found applicable. In *Makah v. State*, 76 Wn.2d 490, 457 P.2d 590 (1969), the court held that the state was entitled to select between sections. In *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), the court by their interpretation of the "where necessary" phrase in Section 6 apparently decided that Section 6 was proper. In *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217 (1974), the state court held that the "legislative method" was correct, requiring an assumption that Section 7 was again being relied upon.

Court of Appeals have required the state to assume jurisdiction by constitutional amendment. Accordingly, this analysis will assemble the arguments for the proposition that a constitutional amendment is necessary and then take a close look at the state and federal cases to decipher their reasoning and discuss how they fit within the requirements of P.L. 83-280.

II.

This Court Has Required A Strict Construction of The Provisions of Public Law 83-280

Three decisions of this Court have dealt with the provisions of P.L. 83-280. In *Kennerly, supra*, this Court held that by the enactment of P.L. 83-280 Congress has preempted the field in the area of transfer of jurisdiction over Indian tribes from the tribal and federal governments to the states and that the provisions of P.L. 83-280 would be strictly construed against both the states and tribes in dealing with jurisdictional matters.

Thus, even the action of the Blackfeet Tribal Council in turning jurisdiction over to the State of Montana, was held void when it was shown that none of the requirements of P.L. 83-280 had been complied with. This Court said:

> With regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country, there was, at the time of the Tribal Council resolution, a "governing Act of Congress," i.e., the Act of 1953. Section 7 of the statute conditioned the assumption of state jurisdiction on "affirmative legislative action", by the state; the Act made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction. *Nor was the requirement of affirmative legislative action an idle choice of words;* the legislative history of the 1953 statute shows

that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities. See H.R. Rep. No. 848, 83rd Congress, 1st Session 6, 7 (1953); *Williams, supra, at 220-221. [Williams vs. Lee,* 358 U.S. 217 (1959)]. Our conclusion as to the intended governing force of § 7 and the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain states to Indian country.* See n. 1, *supra.*

In *Williams,* the Court went on to note the absence of affirmative congressional action, or affirmative legislative action by the people of Arizona within the meaning of the 1953 Act. 358 U.S., at 222-223. Here it is conceded that Montana took no affirmative action with respect to the Blackfeet Reservation. The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act, *supra,* at p. 427.

(Emphasis supplied).

It can be argued that, because Washington has the same Enabling Act language and the same constitutional impediment to Indian jurisdiction as does Montana, this Courts' reliance on Section 7 instead to Section 6 in its decision is recognition that Section 7 may be used by states like Washington and Montana to obtain Indian jurisdiction. Three factors militate against this conclusion.

First, Montana had neither passed legislation nor amended its constitution. Thus, this Court was not presented with the issue of whether one section or the other applied to Montana. Second, none of the briefs presented by the parties in *Kennerly* raise any issue but Section 7. Thus, this Court, noting that Montana had done nothing that might

qualify as an act of asserting jurisdiction did not have to look behind the statements of counsel as to which section applied.

Finally, in *McClanahan, supra,* this Court cleared up the matter by indicating that states like Arizona, which also shares the same Enabling Act and constitutional impediment language with Montana and Washington, would have to amend its constitution in order for it to obtain Indian jurisdiction. In *McClanahan,* the Court said:

> Finally, it should be noted that Congress has now provided a method whereby states may assume jurisdiction over reservation Indians. Title 25 U.S.C. § 1322 (a) grants the consent of the United States to states wishing to assume criminal and civil jurisdiction over reservation Indians. But the Act expressly provides that the state must act "with the consent of the tribe occupying the particular Indian country," 25 U.S.C. § 1322(a), and must "appropriately amend [its] constitution or statutes." 25 U.S.C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the states were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly vs. District Court,* 400 U.S. 423 (1971).
>
> Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected.

Kennerly and *McClanahan* together provide the legal basis for making a decision regarding the necessity of amendment in order to obtain jurisdiction. The principle of strict and narrow construction of P.L. 83-280 established in those cases was carried forward in *Bryan, supra.*

III.

The Legislative History of P.L. 83-280 Shows That Washington Was Required to Amend Its Constitution Prior to Assume Indian Jurisdiction

In its decision on rehearing in *Quinault Tribe v. Gallagher*, 368 F.2d 648 at 656 (9th Cir. 1966), that Court construed the legislative history of P.L. 83-280 (found at 1953 U.S. Code Cong. and Admin. News, pp. 2412-2414) to allow the state of Washington to take jurisdiction by legislative rather than constitutional amendment. Unfortunately, very little of the legislative history relating to the adoption of that Act was available to the Ninth Circuit in 1966. In addition to the published hearing report, *supra*, the House Committee on Interior and Insular Affairs (Subcommittee on Indian Affairs), held other hearings attached as appendices to the brief of Respondent Yakima Indian Nation. This Court used that legislative history extensively in its decision in *Bryan*. See note 9 at 383.

Simply stated, Public Law 83-280 means what Congress intended it to mean. *See*: *e.g.*: *Jones v. Guaranty & Indemnity Co.*, 101 U.S. 622 (1879); *The People v. Utica Ins. Co.*, 15 Johns (N.Y.) 357; *United States v. Babbit*, 1 Black 55, 101 U.S. ...., at 626; *United States v. Cooper Corp.*, 312 U.S. 600 (1941) at 606; *United States v. American Trucking Ass'n., Inc.*, 310 U.S. 534 (1940); *Brooks v. Mobile School Board*, 31 Ala. 227; *United States v. Landram*, 118 U.S. 81 at 85 (1886); *Singer v. United States*, 323 U.S. 338 (1945); *Supreme Investment Co. v. United States*, 468 F. 2d 370, 381 (5th Cir. 1972); *United States v. CIO*, 335 U.S. 106 (1948); *Harrison v. Northern Trust*, 317 U.S. 476 (1943); *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Galvan v. Press*, 347 U.S. 522 (1954); *Schwegmann Bros. v. Calvert Distillers Corp.*, 431 U.S. 384 at 394-5 (1951).

IV.

Indian Jurisdiction Under the Enabling Acts

Keeping applicable rules of statutory construction in mind, it is necessary to examine the legislative history of Public Law 83-280. The law was not enacted in a vacuum, but was one of many pieces of Indian legislation considered by the 83rd Congress. An examination of Senate Report No. 699 which accompanied H.R. 1063, reveals that in the midst of termination bills and other measures in five district areas of legislation, Public Law 83-280 as passed, was narrowly tailored to meet two legislative purposes. The statute was to extend state criminal laws to Indian country and to make provision for state courts to adjudicate civil controversies affecting Indians arising in Indian country.

The original bill, introduced by Congressman Norris Poulson of California, was drafted for California alone. But the Department of the Interior recommended that it be recast as a prototype bill allowing all states to assume Indian jurisdiction upon compliance with its provisions. The attempt led head-on into a snarl of constitutional complexity. The difficulty lay in the decisions of this Court and congressional acts in response to those decisions prohibiting state jurisdiction in Indian country.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), this Court held that until Indian title to Indian country was extinguished, (1) Indian country remained separate and apart from states and state laws could not be applied extraterritorily inside the reservations, and, (2) attempts to assert state jurisdiction over Indian country invaded the exclusive power of the United States to regu-

late Indian commerce. In the Indian Trade and Intercourse Act, 4 Stat. 729, Congress defined "Indian country" as land to which Indian title had not been extinguished including Indian lands within states and outside states.

In the *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1886), this Court affirmed *Worcester*, and in a companion case, the *New York Indians*, 72 U.S. (5 Wall.) 761 (1886), the Court extended the doctrine to the thirteen original states. The significance of the *New York Indians* is that this Court's prohibition of state jurisdiction on Indian reservations is shown to be independent of state enabling acts.[2] Thus, reliance on what is or is not in the precise words of state enabling acts is dangerous when dealing with jurisdiction on reservations.

In 1888, the date of congressional debate of the enabling act for Washington, Montana, and the Dakotas; state Indian jurisdiction was prohibited (1) by the Supreme Court until Indian title was extinguished and (2) by Congress under its exclusive power to regulate the affairs of reservation Indians.

The key to understanding Congress' intent in the Washington enabling act and later in Public Law 83-280 is recognizing that the "consent of the United States" to assumption of Indian jurisdiction contemplated in the enabling act was predicated upon a previous extinguishment of Indian title which the General Allotment Act of 1887 was specifically designed to effect. In *Draper v. United States*, 164 U.S. 240, 246 (1896), this Court recognized § 6 of the

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2. Congress would not have had to enact Section 7 of P.L. 83-280 permitting states without enabling act prohibitions to take Indian jurisdiction if the only bar to Indian jurisdiction were the enabling act.

General Allotment Act as contemplating ". . . the gradual extinction of Indian Reservations and Indian titles."

The allotment system was, however, dismantled in the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and successive federal statutes have continued the trust status of tribal and allotted Indian lands. Indian title has not been extinguished, and the boundaries of reservations have been defined in a federal statute, 18 U.S.C. § 1151. *See*: *DeCoteau v. District Court*, 420 U.S. 425 (1975) footnote 2.

V.

The Class of Constitutional Impediment States

Another problem, of equal significance, is that the ordinance called for in § 4 of the enabling act was, by the terms of the act, incorporated into the constitutions of Washington, Montana, and the Dakotas, and similar ones were incorporated into the constitutions of Arizona, New Mexico, Oklahoma and Utah. But since the consent of "the people of said states", was made a federal requirement to state assumption of Indian jurisdiction under the various enabling acts, and since each state constitution could only be changed through its amendatory procedure, the 83rd Congress was aware that amendments to those eight state constitutions were necessitated by the federal enabling acts and the state constitutions. They were also quite aware of the necessities of maintaining a federal system of government and the requirements of the state-federal relationship.

The difficulty which confronted Congress in 1953, then, lay in part in its desires to consent to state assumption of Indian jurisdiction without extinguishment of Indian title or destroying reservation boundaries, and in part in the

necessity under federal law of amendment of state constitutions for eight of the 26 states under consideration. The constitutional maze through which Congress had to thread its way required that for the constitutional impediment states the United States give an altered consent crafted to achieve Congress' aim through provision for amendment of state constitutions and the unusual device of simultaneous but conditional amendment of the federal enabling acts.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped P.L. 83-280 is available to illumine for this Court the step by step evolution of the act. See: Unpublished reports of the hearing on H.R. 1063 before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 1st Sess. *Bryan, supra,* note 9.

VI.

The Legislative History

The evolution of §§ 6 and 7 of Public Law 83-280 can best be ascertained from the informed Congressional discussion in the Committee hearing. Mr. Abbott, counsel to the Committee, first stated:

> The bill does not, as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling acts for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and Washington provided that exclusive federal jurisdiction would be retained.
>
> The Indian Bureau in listing states pointed out that those eight states now have organic law impediments

> in their constitutions or other laws which would not enable them to take on state jurisdiction. . .
>
> I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they would remove those impediments by action of the people in the state, they could then take over the exclusive criminal and civil jurisdiction over Indians and Indian matters.
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> In addition, Mr. Westland's state [Washington], which is one state which has a constitutional impediment, the one section provides for removal by the state of constitutional impediments. The other section would apply to any other of the 15 Indian states, so that they by affirmative action could assume either criminal or civil jurisdiction or both, at such time as the matter were laid before the legislative bodies.
>
> In short, the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply first to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
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> The other amendment would apply to any other Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

Committee Hearing on H.R. 1063, p. 2, l. 22,—p. 3, l. 7; p. 3, l. 16 to p. 4, l. 4.

It can be seen that in order to allow the bill to operate nationwide, the legal analysts who developed the bill recognized that amendments would have to be made to provide for differing legal problems in two distinct classes of states.

The two amendments with sharply contrasting language must be studied carefully.

Section 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their State Constitution or statutes as the case may be.

Section 7. The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of actions, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the state to assumption thereof.

Public Law 83-280, 67 Stat. 588 at 590.

Mr. Abbott's bald statement that § 6 and not § 7 governs Washington, makes Congress' intent very clear. But the matter doesn't end there. The conclusion is bolstered in the Senate and House Committee Reports on H.R. 1063, which read in part:

> Your Committee has amended the printed bill by adopted substituted language which operates to—
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> (2) give consent of the United States to those states presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.
>
> Examination of the federal statutes and state constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these states in the absence of consent being given for future action to assume jurisdiction is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished; such states could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedures.

S. Rep. 699, 83rd Cong., 1st Sess., H. Rep. 848, 83rd Cong., 1st Sess.

The matter is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

> MR. CASE: . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which *make it possible for states which by their compact* with the United States or, in some cases their constitution, ceded *jurisdiction with respect to Indian lands to the United States, to amend their constitutions* so as to come under to provisions of the bill. I have in mind, of course, particularly, the situation in South Dakota and *Washington* under the identical enabling act. I understand that the same situation obtains in Montana, North Dakota, and possibly Wyoming.
>
> MR. BARRETT: Mr. President, the Senator from South Dakota is correct.

(Emphasis supplied.) 99 Cong. Rec. 19782 (August 1, 1953).

Congress' intent in P.L. 83-280 is detailed (1) by the sponsors of the Act, (2) in Congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. All agreed unanimously that § 6 and not § 7 governed Washington. The Bureau of the Budget in it's recommendation to President Eisenhower concurred.

VII.

The Meaning of Section 6

Section 6 begins: "Notwithstanding the provisions of any Enabling Act for the admission of a state . . ." and then grants federal consent to amendment of the constitution.

The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

> MR. BERRY: Mr. Chairman, I would like to ask a question. Would it be better to word that to say that this "shall be applicable" instead of saying "consent is hereby granted." Why not say, "the provisions of the law shall be applicable", to these states wherein they do these things.
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> MR. WESTLAND: I believe the law would then be applicable to them, once they had taken this affirmative action.
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> MR. RHOADES: Will the gentlement yield. You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.
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> MR. DAWSON: That brings up another question: Whether your wording should refer to the Enabling Act. You say, "We hereby give our consent for them to amend their state constitution." Their state constitution was based on the Enabling Act. In other words they followed that. I wonder whether we should have something in there to say, "Notwithstanding any restrictions in the Enabling Act, consent is hereby givent to amend their state constitution."
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> MR. ABBOTT: [Counsel] I think that would help clarify the intent of the committee at the present time and of Congress if they favorably acted on the legislation.

Committee Hearing on H.R. 1063, p. 8, l. 20 to p. 9, l. 22.

When Congress did act favorably on the legislation its intent to amend the Enabling Act for the limited purpose of allowing constitutional amendment became law. But it must be firmly kept in mind that the Enabling Act amendment was only conditional and only became operative by virtue of state constitutional amendment. The provision to § 6 underscores this conclusion. ". . . Provided, that until the provisions of this Act shall not become effective . . . until . . ." 67 Stat. 588 at 590.

Bluntly put, since Washington did not amend its constitution, its Enabling Act was not amended by Public Law 83-280 and it could not validly assume Indian jurisdiction.

VIII.

Why A State Constitutional Amendment Was Required By Congress—The Concept of Federalism

Congressmen debating P.L. 83-280 were concerned not only with the effect of the bill on the jurisdiction of the states and the United States in Indian Country, they were concerned with the structure of the compact between the states and the United States as represented by the federal enabling act and the State constitutional impediment which implemented that federal act. In other words, they were concerned with the consistency and integrity of the federal constitutional system.

> MR. BERRY: Mr. Chairman, then we get right back to your objection. Congress does not have to give consent to a state to amend its constitution or its laws.
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> MR. DAWSON: Because when the Enabling Act was passed, they said this state can become a state upon certain conditions except for the Enabling Act.
>
> In other words, we restrict what they can put in their

laws and constitution to begin with. The state cannot go any further than their government lets them go when they become a state, so we are now lifting one of those restrictions.

With respect to the state of Utah, for instance, the federal government said, the state of Utah shall not pass any laws giving them jurisdiction over Indians, or to try Indians for offenses. That was part of the Enabling Act on which our constitution was based. Therefore, we have no right to change our statutes without the consent of the government.

It is in the Enabling Act in all of these five states. That is the reason for my suggestion that you might well refer to the Enabling Act and say, "Notwithstanding any provisions of the Enabling Act consent is hereby given to amend the constitution."

MR. ABBOTT: [Counsel] It is in the constitution as a direct result of being in the Enabling Act. In the government Enabling Act the federal government retained the jurisdiction and the states in their constitutions had a prohibition against any legislation which would assume jurisdiction.

Committee Hearing on H.R. 1063, p. 9, l. 23, to p. 10, l. 25.

Here Congress was expounding not on Indian jurisdiction, but on the basic law of the federal system with regard to organic relations between the states and the federal government. The concern was not only that Congress withdrew the prohibitions in the Enabling Act in a proper manner within the federal system, but that the states also withdrew their agreements to that prohibition in a proper manner under the federal law.

The question of whether state law requires constitutional amendment was never at issue here. The question is specifically one of federal law and the legal requirements of operating under a federal system.

IX.

Consent To Amendment of State Constitution

After the initial amendatory language § 6 continues:

> the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this Act. . .

67 Stat. 588 at 590.

Thus, § 6 gives federal consent to state assumption of Indian jurisdiction and again the proviso conditions that consent upon amendment of the consttitution. That this twofold conclusion is Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

> MR. BERRY: Does not make this bill applicable to all states who do amend their laws under the constitution, and it greatly increases the authority of the bill.
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> MR. ABBOTT: [Counsel] The intention was to grant it to all states at such time as they were willing to allow take it. The five states we have named have been consulted with by the Indian Bureau. *Any other time in the future that the State of Washington or South Dakota is able to remove their constitutional impediments,* then they could so do it . . . (Emphasis added.)
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> MR. WESTLAND: *I believe the State of Washington* was consulted on this matter and they indicated their readiness to take over this jurisdiction as far as criminal and civil was concerned, but they *do have a constitution there that requires this amendment,* (referring to § 6) in order that they can get at it.

(Emphasis added.)

Committee Hearing on H.R. 1063, p. 7, ll. 14-25; p. 8, ll. 1-9.

Later the Committee began consideration of § 7 which provides Indian jurisdiction for any of the class of states with Indian populations which entered the union without enabling act prohibitions and constitutional impediments. ". . . at such time and in such manner as the people of the state shall by affirmative legislative action, obligate and bind the state to the assumption thereof." 67 Stat. 588 at 590.

The contrast between the language of § 6 authorizing "the people of any state to amend . . . their state constitution" and that of § 7 providing that "the people of the state shall, by affirmative legislative action" points up quite forcefully Congress' plain intent that the triggering event in § 7 be a statute enacted by the legislature. The point was driven home once and for all in the Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order for the Bureau of Indian Affairs, presented the final version of the act.

> MR. ABBOTT: [Counsel to Committee] Mr. Benge informs me there are 26 states shown there as having Indian populations. You can correct it for the record, Mr. Benge, but I believe several of those states have constitutional prohibitions against jurisdiction.
>
> MR. BENGE: Yes, sir; that is right.
>
> MR. ABBOTT: Which would mean that there would be apparently no jurisdiction.
>
> MR. BENGE: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the Union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction

> over crimes committed by Indians on their reservations. To meet that the state legislature would have to amend the constitution.
>
> I take that a general Bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> MR. ASPINALL: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> MR. BENGE: Yes, sir.

(Emphasis supplied.) Subcommittee Hearing on H.R. 1063, p. 23, l. 8, to p. 24, l. 5.

Nothing could demonstrate more effectively Congress' intent that § 6 authorizes Washington to assume Indian jurisdiction not by legislative action but only conditionally upon amendment of the constitution.

However, one difficulty remains: § 6 of Public Law 83-280 authorizes amendment of the constitution "or existing statutes . . .". Does that not mean that simple legislative action without constitutional amendment is alternatively authorized by § 6 for Washington? Are § 6 and § 7 interchangeable in some cases?

Such an interpretation will not do. First, it would make § 6 and § 7 equivalent, and therefore, § 7 totally redundant in blatant violation of the maxim of avoiding redundancies; *United States v. Landrum*, 188 U.S. 31, 30 L. Ed. 58, 6 S. Ct. 954 (1886). Finally, and providentially, the very problem occurred to Congressman Wesley A. D'Ewart of Montana during committee deliberations.

> MR. WESTLAND: This amendment would insert two new sections. First, is Section 6, which says: "The consent of the United States is hereby given to the

people of any state to amend where necessary their state constitutions or existing statutes . . ."

MR. D'EWART: I do not think we have to grant permission to a state to amend its own statutes.

MR. ABBOTT: [Counsel] Mr. D'Ewart, I believe the reason for that is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act [the Enabling Act], and it may be unnecessary, but by some state courts, it may be interpreted as being necessarry.

Committee Hearing on H.R. 1063, p. 6, ll. 18-22, p. 7, ll. 5-11.

The grant of permission to amend statutes in § 6, then, is an extra measure of consent to states with disclaimers of Indian jurisdiction in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be in addition to constitutional amendment and is decidedly not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma, North Dakota, and South Dakota. The extra measure of consent to amend statutes in § 6 is limited to those three states.

X.

Whether Washington Has Validly Assumed Indian Jurisdiction Is A Federal Question

The transfer of jurisdiction over an Indian tribe and its reservation between the United States and one of the states of the Union, is a transfer which involves the rights and powers of three sovereignties; the United States, the State, and the Tribe. The matter at issue here is in the nature of the compact or agreement between sovereigns, *United States v. Brown*, 339 F. Supp. 536 (D.C. Neb. 1971). In cases in which the interpretation of such an

agreement has been at issue, the courts of the United States have always looked to federal law.

In the case of *Dyer v. Sims*, 341 U.S. 22 (1951), the Court not only held that an interstate compact should be interpreted according to federal law; it went on to interpret a state constitution, already interpreted by the state courts on the issue, under federal law. In *Lesser v. Garnet*, 258 U.S. 130 (1922), the Court applied federal law to the ratification by the state legislatures of Tennessee and West Virginia of the Nineteenth Amendment to the United States Constitution.

The meaning of an interstate compact is a matter of federal law. *Dyer v. Sims, supra; Petty v. Tennessee-Missouri Bridge Co.*, 359 U.S. 275 (1959); *Nebraska v. Iowa*, 406 U.S. 117 (1972). Federal law and construction also applies to compacts between states and the United States. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

The question of whether as a matter of state law the constitution of the State of Washington must be amended or not pursuant to P.L. 83-280 does not have to be reached. It is clear under the federal enabling act that the constitutional impediment required thereby was contemplated by the federal government to prevent the state from taking jurisdiction over Indians on their reservations.

Required state action under § 6 to trigger conditional amendment of the federal enabling act and effect Congress' consent to state assumption of Indian jurisdiction is a federal function deriving from the federal constitution. *Lesser v. Garnet, supra.* Only federal interpretation of the effectiveness of the triggering event is controlling. *Lesser v. Garner, supra.*

Here, the federal interpretation of Congress that the triggering event be a state constitutional amendment is not only decisive, but is guaranteed by the proviso in § 6. A State Supreme Court may not so interpret the state constitution as to avoid a federal rule. *Dyer v. Sims, supra.*

In two recent cases involving the same event, the retrocession of state jurisdiction over the Omaha reservation to the federal government by the legislature of Nebraska, both Courts held that federal law should be used to consider the effect of the retrocession by that legislature. *United States v. Brown,* 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 337 F. Supp. 823 (D. Neb. 1971).

In the *Brown* and *Omaha Tribe* cases, the courts held that federal law governed because the scheme for the accomplishment of retrocession is a federal one and that even though the resolution of the Nebraska legislature granting retrocession was invalid under state law, the federal law scheme was satisfied by the presumedly valid resolution.

Congress has the power to require states to amend their constitutions even though such an amendment might not have been necessary under state law. *See*: *McClanahan, supra,* at 165, 178-169, 170-172, 175-177. Questions regarding jurisdiction over reservation Indians are federal questions. This Court is not bound by a state court interpretation of the Washington Enabling Act or of P.L. 83-280. *See Kennerly, supra.* Any ambiguity in a federal statute dealing with Indian people is to be interpreted so as to benefit the interest of Indians. *Bryan, supra; Squire v. Capoeman,* 351 U.S. 1, 6-9 (1956); *United States v. Santa Fe R.R.,* 314 U.S. 339, 353-354 (1941); *Choate v. Trapp,* 244 U.S. 665 (1912), *Cherokee Intermarriage*

Cases, 203 U.S. 76, 94 (1906). In interpreting Article 26 of the Washington Constitution, this Court is not bound by state court rulings and must guard against state rulings which undermine federal laws and programs. *See*: *First Agriculture National Bank of Berkshire Co. v. State Tax Commission,* 392 U.S. 339, 347-348 (1968); *Kem-Limerick Inc. v. Scurlock,* 347 U.S. 110, 121 (1954); *Mason Co. v. Tax Commission,* 302 U.S. 186, 206-207 (1937); *Carpenter v. Shaw,* 280 U.S. 363, 367-368 (1930); *Ward v. Love,* 253 U.S. 17, 22-23; *United States v. Little Misere Land Co.,* 412 U.S. 580, 596-607, 603 (1973); *Testa v. Katt,* 330 U.S. 386, 392-393 (1947).

ANALYSIS OF THE QUINAULT DECISION

Quinault v. Gallagher, supra, remains the basis for holdings by state and federal courts that Washington's assumption of Indian jurisdiction was lawful. The *Quinault* Court read the incomplete legislative history of P.L. 83-280 to show that, while Congress may have assumed that the state constitutional disclaimer could be removed by only constitutional amendment, the "underlying concern", of Congress was that the impediment be removed in a manner that would be valid and binding under state law. 368 F.2d at 656. For several reasons this conclusion should now be reconsidered.

First, as stated above, this Court in *Kennerly, supra,* and *McClanahan, supra,* has held that the desires of Congress in this matter must be strictly construed against the states and tribes. Congress by its instructions in P.L. 83-280 has preempted the field of transfer of jurisdiction. While the actions of Montana and Arizona in applying their laws to Indians were certainly valid and binding on

those states, this Court did not find that the satisfaction of any "underlying concern" permitted those states to continue to enforce their laws. On the contrary, this Court found that the state disclaimers had to be removed in a particular way satisfying federal law—a finding squarely opposed to the finding in the *Quinault* court.

As has been shown above, the legislative history shows absolutely and conclusively that Congress commanded the states who fell within Section 6 of P.L. 83-280, (the *Quinault* court seems to agree that Section 6 covers Washington) to amend their constitutions as a prerequisite to taking Indian jurisdiction. As is pointed out by the Congressmen many times, the problem to be solved is one of permitting states to assume jurisdiction under federal law and within the structure of the federal system.

Thus, the acts of the state, simply because they are binding on the state, do not provide full compliance with the act of Congress. It is this final point which the *Quinault* court confuses with the need for a full understanding of the provisions of the enabling act and P.L. 83-280. While the *Quinault* court seems to agree that the federal enabling act and P.L. 83-280 should be interpreted as federal and not state law, the court gives as its reason for deciding that the word "people" in the enabling act did not require a vote of the people the following:

> As we stated above, all that concerned Congress was that the consent of the people be evidenced in some manner valid and binding under state law."

368 F.2d at 657.

In the face of the legislative history and the *Kennerly* and *McClanahan* decisions, this reason is not sufficient.

ANALYSIS OF THE TONASKET DECISION

The last word of the Washington Supreme Court on the question of the validity of State jurisdiction under P.L. 83-280 is contained in *Tonasket v. State of Washington*, 84 Wn.2d 164, 525 P.2d 744 (1974). As was noted in the footnote above, the Washington court has not clearly indicated whether they believe Washington to be under section 6 or 7. This brief will assume, because section 6 is discussed by the *Tonasket* court, that it believes section 6 applies.

The question of whether section 6 or 7 applies is not uppermost in the minds of the *Tonasket* court. Initially they find, 525 P.2d at 752, that the federal enabling act can be narrowly construed (In violation of their holding that enabling acts should be broadly construed, *Boeing v. Reconstruction Finance Co.*, 25 Wn.2d 652, 171 P.2d 838 (1946), to allow the state to take jurisdiction over Indian reservations even without P.L. 83-280. It is curious to note that the analysis of the Washington court in this area is almost word for word and case for case the same as that of the Arizona Court of Appeals in *McClanahan v. Arizona State Tax Commission*, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd, McClanahan, supra.* The enabling act theory of the Arizona court was specifically disapproved by this Court in *McClanahan, supra.* as violating two centuries of history, federal policy, and law dealing with jurisdiction over Indian people and reservations.

The "proprietary versus governmental" distinction relied on by the *Tonasket* court is also disapproved in *McClanahan,* and is no bar to federal overriding of countervailing state interests where the federal government is acting within a delegated power, such as, the power to regulate commerce among the Indians. *Maryland v. Wirtz,* 392 U.S. 183 (1968).

If this holding of the *Tonasket* court is correct, there would have been no reason for Congress to have enacted section 7 of P.L. 280 governing states without enabling act impediments, and indeed, as the *Tonasket* dissent relates; would reduce the whole of P.L. 83-280 to "mere surplusage."

By the use of their enabling act argument, the *Tonasket* court attempts to avoid dealing with P.L. 83-280. When they reach a discussion of the statute, they conclude only that the "where necessary" clause of section 6 gave the state the right to decide whether a constitutional amendment is necessary or not. This argument is not supported

by the legislative history and is not supported by characterizations of P.L. 83-280 in *Kennerly* and *McClanahan* as a "statutory imperative" to be strictly construed by the courts.

Respectfully submitted,

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